Webinar – Using Electronic Information in Criminal Investigation and Prosecution

Hon. Ronald J. Hedges (moderator)

Hon. Edward A. Jerejian, JSC

Stacy Ann Biancamano, Esq.

Angelo J. Onofri, Acting Mercer County Prosecutor

Dan Shapiro, AUSA

IWCRM001116

© 2016 New Jersey State Bar Association. All rights reserved. Any copying of material herein, in whole or in part, and by any means without written permission is prohibited. Requests for such permission should be sent to NJICLE, a Division of the New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520.

Thank you for logging in – the webinar will begin shortly.

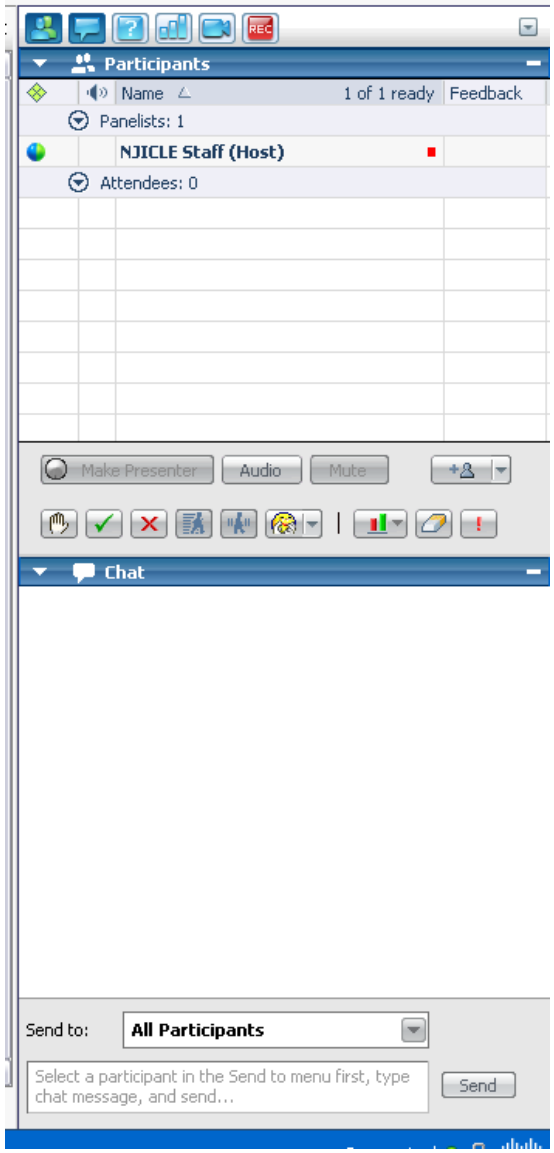
USING ELECTRONIC INFORMATION IN CRIMINAL INVESTIGATION & PROSECUTION

Using The Online Classroom

1. All Attendee phone lines are muted.
2. Questions may be submitted
   - Via Chat on the right hand side of your screen.
   - Questions will be answered periodically during the presentation

Note: Attendees with dial up connections will see a slower response.

Asking Questions – Easy as 1,2,3



3. See your messages here

1. Type your question here.

2. Send

SEMINAR MATERIALS AND CLE FORMS

- TO ACCESS SEMINAR MATERIALS, ATTENDANCE VERIFICATION AND CLE FORMS PLEASE GO TO:

http://tcms.njsba.com/personifyebusiness/njicle/WebinarInformation.aspx

ATTENDANCE VERIFICATION

- PLEASE FAX OR E-MAIL YOUR ATTENDANCE VERIFICATION FORM TO NJ ICLE

- FAX: 732-249-1428

- E-MAIL: smilek@njsba.com

USING ELECTRONIC INFORMATION IN CRIMINAL INVESTIGATION & PROSECUTION

NJICLE

June 14, 2016

FACULTY

- Ronald J. Hedges, Esq. (moderator)
- Hon. Edward A. Jerejian, JSC
- Stacy Ann Biancamano, Esq.
- Angelo J. Onofri, Acting Mercer County Prosecutor
- Dan Shapiro, AUSA

MATERIALS

- R.J. Hedges & A.W. Wagner, “Competence With Electronically Stored Information: What Does It Mean In the Context of Litigation and How Can Attorneys Achieve It?,” 15 DDEE 134 (2015).
- R.J. Hedges, editor, *Electronic Information in Criminal Investigations and Actions: Representative Court Decisions and Supplementary Materials* (Feb. 2016).

MATERIALS

- R.J. Hedges, editor, *Representative Federal and State Judicial Decisions and Supplementary Materials Involving Protective Orders, Confidentiality and Public Access in Civil and Criminal Matters* (May 2016).
- *Criminal e-Discovery: A Pocket Guide for Judges* (Federal Judicial Center 2015).
- *Recommendations for Electronically Stored Information* (ESI) *Discovery in Federal Criminal Cases* (JETWG: Feb. 2012).

COMPETENCE

State v. Scoles, 214 N.J. 236 (2013):

- New Jersey Supreme Court demands level of "ESI competence" in context of child pornography prosecution.
- Court established framework by which images may be copied and inspected at defense counsel's office.
- Framework includes requirement that defense counsel "demonstrate the ability to comply with *** a *** order to secure the computer images" and anticipate "advances in technology."

COMPETENCE

- The California State Bar Standing Committee on Professional Responsibility and Conduct states in Formal Opinion No. 2015-193 (June 30, 2015) that attorneys should have the technical competence and skill to manage discovery of ESI in civil actions – either by themselves, co-counsel, or expert consultants.

COMPETENCE

Attorney's ethical duties:

- "initially assess e-discovery needs and issues, if any;
- implement/cause to implement appropriate ESI preservation procedures;
- analyze and understand a client's ESI systems and storage;

COMPETENCE

- advise the client on available options for collection and preservation of ESI;
- identify custodians of potentially relevant ESI;
- engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan;

COMPETENCE

- perform data searches;
- collect responsive ESI in a manner that preserves the integrity of that ESI; and
- produce responsive non-privileged ESI in a recognized and appropriate manner."

(footnotes omitted)

REASONABLE EXPECTATIONS OF PRIVACY

- "Although text messaging has enjoyed a precipitous rise ***, it is still a relatively new phenomenon and, as is often the case with new technology, courts may struggle to adapt existing legal principles to new realities. It is often not easy to pour new wine into old wineskins, yet wise stewardship might suggest the use of the old skins until they burst. So too, legal principles developed in the context of more antediluvian forms of communication may provide useful guidance ***." *State v. Patino,* No. 2012-263-C.A. (R.I. Sup. Ct. June 20, 2014).

REASONABLE EXPECTATIONS OF PRIVACY

- *States v. Earls,* 70 A.3d 630 (2013) (imposing warrant requirement under New Jersey Constitution).
- *State v. Andrews,* No. 1496 (Md. Ct. Special App. Mar. 30, 2016).
- *United States v. Miller,* No. 15-cr-00202 D.N.J. Apr. 11, 2016).
- *United States v. Carpenter,* No. 14-1572 (6th Cir. Apr. 13, 2016).

SEARCH WARRANTS & *EX ANTE* CONDITIONS

- *State v. Feliciano,* A-24-14 (N.J. Sup. Ct. Mar. 9, 2016).

SEARCH WARRANTS *& EX ANTE* CONDITIONS

- *In re Appeal of App. for Search Warrant,* 2012 VT 102 (Sup. Ct. 2012), *cert.* denied, 569 U.S. ___ (2013) (*ex ante* conditions).
- *United States c. Comprehensive Drug Testing Inc.,* 621 F.3d 1162 (9th Cir. 2010) (*en banc*), "recommended" *ex ante* conditions:
  - Government waive "plain view"
  - Independent personnel segregate nonresponsive ESI
  - Applications and subpoenas disclose risk of destruction
  - Search procedure be used to locate only responsive ESI
  - Government destroy or return nonresponsive ESI

SEARCH WARRANTS & *EX ANTE* CONDITIONS

- *I/M/O/ Search of Information Associated with [Redacted] @mac.com that is Stored at Premises Controlled by Apple, Inc.,* Mag. No. 14-228 (D.D.C. Aug. 8, 2014).
- *United States v. Brooks,* No. 15-11015 (11th Cir. Apr. 15, 2016).

SURVEILLANCE & SEIZURE OF SOCIAL MEDIA

- *In re M.C.,* ___ P.3d ___, 2015 WL 865320 (Nev. Feb. 26, 2015).
- *United States v. Gatson,* Crim. No. 13-705, 2014 WL 7182275 (D.N.J. Dec. 16, 2014).

FIFTH AMENDMENT

- *In Re Grand Jury Subpoena Duces Tecum Dated March 29, 2012,* 670 F.3d 1335 (11th Cir. 2012).
- *Commonwealth v. Gelfgatt,* 468 Mass. 512 (Sup. Jud. Ct. 2014).
- *Commonwealth v. Baust*, No. CR 14-1439, 2014 WL 6709960 (Va. 2d Jud. Cir. Oct. 28, 2014).

FIFTH AMENDMENT

- *In the Matter of the Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203*, No. 16-00010 (C.D. Ca.).

DISCOVERY AND COOPERATION

United States v. Hernandez, 14 CR 499 (KBF) (S.D.N.Y. Sept. 12, 2014) (denying request to appoint "coordinating discovery attorney" in multi-defendant criminal action).

United States v. Suarez, 2010 WL 4226524 (D.N.J. Oct. 21, 2010) (Government spoliation).

United States v. Skilling, 554 F.3d 529 (5th Cir. 2009), vacated in part on other grounds, 130 S. Ct. 2896 (2010) (alleged *Brady* violation by massive ESI production).

AUTHENTICATION, ADMISSIBILITY & TESTIMONY

The “hurdles” to admissibility:

1. Is it relevant?
2. Is it authenticated?
3. Is it hearsay?
4. Is it an original?
5. Is there undue prejudice?

AUTHENTICATION, ADMISSIBILILTY & TESTIMONY

United States v. Vayner, 769 F.3d 125 (2d Cir. 2014).

AUTHENTICATION, ADMISSIBILITY & TESTIMONY

Who is competent to testify about ESI?

- *United States v. Lizzarraga-Tirado,* 789 F.3d 1107 (9th Cir. 2015).
- *Collins v. State,* No. 2013-CT-00761-SCT (Miss. Aug. 20, 2015).

QUESTIONS?
CLOSING THOUGHTS
THANK YOU

Thank you

- The webinar has ended.
- The program handbook, relevant CLE forms and additional materials for this program can be accessed at:
- **http://tcms.njsba.com/personifyebusiness/njicle/WebinarInformation.aspx**
- Please hang up your telephone now.

Electronic Information in Criminal Investigations and Actions:

Representative Court Decisions and Supplementary Materials

Ronald J. Hedges, Editor

Trevor Satnick, Research Assistant

February, 2016

© 2015 Ronald J. Hedges

Reprint permission granted to all state and federal courts, government agencies, court-appointed counsel, and non-profit continuing legal education programs

Table of Contents

DECISIONS – SUPREME COURT 2

Bullcoming v. New Mexico 2

Florida v. Jardines 3

Maryland v. King 3

Maryland v. Kulbicki 4

DECISIONS – FEDERAL 5

In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [redacted] 5

In re Application for Search Warrant 5

In re Applications for Search Warrants for Information Associated With Email Address 6

In re Application of the United States of America for Historical Cell-Site Data 7

In re Application of U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D) 9

In re Application for Telephone Information Needed for a Criminal Investigation 10

Application for Warrant for E-Mail Account 11

In re Boucher 12

Bill v. Brewer 12

In re Cell Tower Records Under 18 U.S.C. 2703(D) 13

In re Decryption of a Seized Data Storage System 14

Doe v. Shurtleff 14

EEOC v. Burlington N. Santa Fe R.R. 15

EEOC v. Kronos Inc. 16

Grady v. North Carolina 18

In re Grand Jury Empanelled on May 9, 2014 18

In re Grand Jury Subpoena Duces Tecum Dated March 25, 2012 (United States v. Doe) 19

In re Grand Jury Subpoenas 20

Hart v. Mannina 20

House v. Napolitano 21

Huff v. Spaw 22

Kelly v. Rogers 23

Miller v. Mitchell 23

In re Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued by This Court 23

Patel v. City of Los Angeles 24

Rann v. Atchison 25

Sams v. Yahoo Inc. 26

Schlossberg v. Solesbee 26

In re Sealed Case 27

In re Search of Electronic Communications (Both Sent and Received) in the Account of Chakafattah@gmail.com at Internet Service Provider Google, Inc. 28

In re Search of Google Email Accounts 28

In re Search of premises known as Three Cellphones & One Micro-SD Card 29

In re Search Warrants for Info. Associated with
[redacted]@mac.comthat is Stored at Premises Controlled by Apple, Inc. **30**
In re Search Warrants for Info. Associated with Target Email Accounts/Skype Accounts **32**
In re Search of Motorola Cellular Telephone **34**
Sec. & Exch. Comm'n v. Huang **34**
Sennett v. United States **35**
In re Smartphone Geolocation Data Application **36**
In re Subpoenas **37**
United States v. Aguiar **38**
United States v. Ahrndt **38**
United States v. Albertson **40**
United States v. Andres **41**
United States v. Ayache **42**
United States v. Baez **43**
United States v. Bah **43**
United States v. Banks **45**
United States v. Bari **45**
United States v. Barnes **46**
United States v. Beckett **47**
United States v. Beckmann **48**
United States v. Berg **49**
United States v. Blagojevich **49**
United States v. Borowy **50**
United States v. Bowen **51**
United States v. Bradbury **52**
United States v. Brooks **53**
United States v. Burgess **53**
United States v. Burnett **54**
United States v. Bynum **56**
United States v. Carpenter **56**
United States v. Carroll **57**
United States v. Christie **58**
United States v. Cioffi **58**
United States v. Comprehensive Drug Testing, Inc. **59**
United States v. Connor **60**
United States v. Cuevas-Perez **61**
United States v. Davis **62**
United States v. Davis **63**
United States v. Davis **64**
United States v. Deppish **66**
United States v. Diamreyan **68**
United States v. Djibo **68**
United States v. Drew **69**
United States v. DSD Shipping **69**
United States v. Durdley **70**
United States v. Epstein **71**
United States v. Espinal-Almeida **72**

United States v. Esquivel-Rios 73
United States v. Farkas 74
United States v. Farlow 75
United States v. Fluker 75
United States v. Frenchette 76
United States v. Galpin 76
United States v. Ganias 77
United States v. Gatson 80
United States v. Gatson 81
United States v. Graham 81
United States v. Graham 82
United States v. Halliburton Energy Services Inc. 83
United States v. Heckman 84
United States v. Hock Chee Koo 84
United States v. Hoffman 86
United States v. Hopson 87
United States v. Huart 87
United States v. Jarman 88
United States v. Jenkins 89
United States v. Jenkins 89
United States v. Johnston 90
United States v. Jones 91
United States v. Katakis 91
United States v. Katakis 92
United States v. Kernell 93
United States v. Kilbride 93
United States v. Kim 94
United States v. King 95
United States v. Kinson 96
United States v. Ladeau 96
United States v. Lang 97
United States v. Lawing 98
United States v. Lichtenberger 98
United States v. Little 99
United States v. Lizarraga-Tirado 100
United States v. Lowe 101
United States v. Mann 101
United States v. Meregildo 103
United States v. Miller 103
United States v. Mitchell 104
United States v. Molina-Gomez 104
United States v. Montgomery 105
United States v. Mulcahey 106
United States v. Muniz 107
United States v. Nosal 107
United States v. O'Keefe 108
United States v. Perez 108
United States v. Phaknikone 109

United States v. Pierce **109**
United States v. Pineda-Moreno **110**
United States v. Qadri **111**
United States v. Ransfer **112**
United States v. Raymond **113**
United States v. Rigmaiden **114**
United States v. Robinson **115**
United States v. Rubin/Chambers **115**
United States v. Saboonchi **116**
United States v. Salyer **116**
United States v. Schesso **117**
United States v. SDI Future Health Inc. **120**
United States v. Shah **121**
United States v. Sharp **122**
United States v. Sivilla **122**
United States v. Skilling **123**
United States v. Skinner **123**
United States v. Sparks **124**
United States v. Sparks **125**
United States v. Stagliano **126**
United States v. Stanley **127**
United States v. Stephens **128**
United States v. Suarez **129**
United States v. Swartz **129**
United States v. Szymuszkiewicz **131**
United States v. Thielemann **131**
United States v. Thomas **132**
United States v. Thomas **133**
United States v. Thomas **134**
United States v. Valle **135**
United States v. Vaughn **135**
United States v. Voneida **136**
United States v. Vosburgh **136**
United States v. Warshak **137**
United States v. Weaver **139**
United States v. Welch **140**
United States v. Wigginton **141**
United States v. Williams **141**
United States v. Winn **142**
United States v. Woerner **143**
United States v. Wurie **145**
In re Warrant for All Content & Other Info. Associated with the
Email Account xxxxxxx@gmail.com Maintained at Premises Controlled By Google, Inc. **146**
In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp. **147**
In re Warrant to Search a Target Computer at Premises Unknown **149**
Yates v. United States **150**

DECISIONS – STATE 151
In re 381 Search Warrants Directed to Facebook, Inc. 151
In re Alex C. 151
In re Appeal of Application for Search Warrant 152
Apple, Inc. v. Superior Court 153
Bainbridge Island Police Guild v. City of Puyallup 154
Bennett v. Smith Bundy Berman Britton 155
Butler v. State 155
Clark v. State 156
Collins v. State 156
Commonwealth v. Augustine 157
Commonwealth v. Cox 159
Commonwealth v. Denison 159
Commonwealth v. Dyette 160
Commonwealth v. Estabrook 161
Commonwealth v. Gelfgatt 162
Commonwealth v. Rousseau 163
Commonwealth v. Stem 164
Commonwealth v. Tarjick 164
Costanzo v. State 165
In re Cunningham 166
Demby v. State 166
Devega v. State 167
In re the Detention of: H.N. 167
Facebook, Inc. v. Superior Court 168
Freeman v. Mississippi 169
Galloway v. Town of Hartford 170
In re Gee 172
Gill v. State 173
Globe Newspaper Co. v. Superior Court for the County of Norfolk
(In re Globe Newspaper Co., Inc.) 174
Griffin v. State 174
J.B. v. New Jersey State Parole Bd 175
Kelly v. State 176
Kobman v. Commonwealth 176
Long v. State 177
Lowe v. Mississippi 178
In re M.C. 178
In re Maine Today Media Inc. 179
In re Malik J. 180
People v. Barnes 181
People v. Diaz 181
People v. Diaz 182
People v. Goldsmith 183
People v. Harris 184
People v. Holmes 185
People v. Kent 186
People v. Klapper 186

People v. Lewis **187**
People v. Nakai **188**
People v. Superior Court (Chubbs) **188**
People v. Valdez **189**
People v. Weissman **191**
Rutland Herald v. Vermont State Police **191**
Sinclair v. State **192**
Smallwood v. State **193**
Smith v. State **194**
Spence v. State **195**
S.S.S. v. M.A.G. **195**
State v. Ates **196**
State v. Bailey **196**
State v. Brereton **197**
State v. Carlson **198**
State v. Combest **199**
State v. Dabas **200**
State v. Dingham **200**
State v. Earls **201**
State v. Esarey **202**
State v. Estrella **203**
State v. Hamlin **203**
State v. Hinton **204**
State v. Huggett **205**
State v. Lyons **205**
State v. Packingham **206**
State v. Patino **207**
State v. Pittman **207**
State v. Polk **208**
State v. Purtell **208**
State v. Reid **209**
State v. Riley **210**
State v. Rivera **211**
State v. Scoles **211**
State v. Scott **212**
State v. Shannon **213**
State v. Smith **213**
State v. Sobczak **214**
State v. Subdiaz-Osorio **214**
State v. Tate **216**
Sublet v. State **217**
Tienda v. State **219**
Wardlaw v. State **219**

STATUTES, REGULATIONS, ETC.- Federal **220**
18 U.S.C. Sec. 2517 ("Authorization for disclosure and use on intercepted wire, oral, or electronic communications") **220**
18 U.S.C. Sec. 2703(f) ("Requirement to Preserve Evidence") **221**

"The Attorney General's Guidelines for Domestic FBI Operations" 222
"Best Practices for Electronic Discovery in Criminal Cases," 222
Department of Justice Policy Guidance: Domestic Use of Unmanned Aircraft Systems (UAS) 222
Department of Justice Policy Guidance: Use of Cell-Site Simulator Technology 223
"General Order Regarding Best Practices for Electronic Discovery of Documentary Materials in Criminal Cases" 223
Letter to Senator Wyden from Internal Revenue Service 224
Managing Large Volumes of Discovery in Federal CJA Cases 224
Proposed Amendments to Federal Rule of Evidence 224
"Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases" 226
"Suggested Practices Regarding Discovery in Complex [Criminal] Cases," 226
"United States Department of Justice, Prosecuting Computer Crimes" 227
"United States Department of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations"* 227

STATUTES, REGULATIONS, ETC.- State 227
***R*. 3:9-1(b) ("Meet and Confer Requirement; Plea Offer") 227**
***R*. 13-5(c) ("Special Service Charge for Electronic Records") 228**
Attorney General Law Enforcement Directive No. 2015-1 228
Minnesota S.F. No. 1740 229
Missouri Constitutional Amendment No. 9, amends Section 15 of Article I 229
"Policy and Procedure Information and Updates: Public Recordings," 230
SB 178, enacted into law Oct. 8, 2015 230
TEXAS HB2268, Section 5A 231

PUBLICATIONS 232
The Federal Grand Jury 232
Criminal E-Discovery: A Pocket Guide for Judges 232
Overview of Constitutional Challenges to NSA Collection Activities 232
Massachusetts Evidence Guide for First Responders 232
Massachusetts Digital Evidence Guide 232
Digital Privacy and E-Discovery in Government Investigations and Criminal Litigation 233

ARTICLES 234
K.S. Bankston & A. Soltani, "Tiny Constables and the Cost of Surveillance: Making Cents out of United States v. Jones" 234
Best Practices for Victim Response and Reporting of Cyber Incidents 234
D. Barrett, "U.S. Urges Bodycams for Local Police, but Nixes Them on Federal Teams" 234
D.R. Beneman & D.L. Elm, "Extraterritorial Search Warrants Rule Change," Criminal Justice 9 (Winter 2014) 234
G. Blum & B. Wittes, "New Laws for New Threats Like Drones and Bioterrorism" 235
T.E. Brostoff, "Constitutional and Practical Dimensions of ESI in Federal and State Criminal Actions" 235
T.E. Brostoff, "ESI in the Criminal Justice System Webinar Discusses Pre- and Post-Indictment Issues" 235

T. Brostoff, "From Quon to Riley and Beyond: Criminal Law, eDiscovery and New Trends," 15 DDEE 527 (2015) 236
T. E. Brostoff, "Riley's Implications on Future Jurisprudence and Fourth Amendment Discussed in Webinar" 236
B. Canis & D.R. Peterman, "Black Boxes" in Passenger Vehicles: Privacy Implications 236
K. Chayka, "Somebody's Watching: In the Age of Biometric Surveillance There is No Place to Hide 236
Z. Elinson, "More Officers Wearing Body Cameras 237
D.E. Elm & S. Broderick, "Third-Party Case Services and Confidentiality," 237
J.A. Engel, "Rethinking the Application of the Fifth Amendment to Passwords and Encryption in the Age of Cloud Computing" 237
C. Fariver, "FBI Would Rather Prosecutors Drop Cases Than Disclose Stingray Details" 238
C. Friedersdorf, "The NYPD is Using Mobile X-Ray Vans to Spy on Unknown Targets," 238
D.K. Gelb, "Defending a Criminal Case from the Ground to the Cloud" 238
D.K. Gelb & D.B. Garrie, "A Dilemma for Criminal Defense Attorneys: The Benefit of Pursing ESI Versus the Detriment of Implicating the Client" 239
A.D. Goldsmith & J. Haried, "The New Criminal ESI Discovery Protocol: What Prosecutors Need to Know," 239
A.D. Goldsmith, "Trends – Or Lack Thereof – In Criminal E-Discovery: A Survey of Recent Case Law," 239
L.A. Gordon, "A Byte Out of Crime" 240
J. Gruenspecht, "Reasonable' Grand Jury Subpoenas: Asking for Information in the Age of Big Data" 240
R.J. Hedges, "Sentencing Guidelines, Corporate Governance and Information Management 240
E. H. Holder, Jr., "In the Digital Age, Ensuring that the Department Does Justice," 41 Geo. L.J. Ann. Rev. Crim. Proc. iii (2012) 240
R.F. Kennedy, "Sequestration and the Impact on Access to Justice – a Growing Problem" 241
O. Kerr, "A Revised Approach to the Fifth Amendment and Obtaining Passwords," Washington Post (posted Sept. 25, 2015) 241
O. Kerr, "Fourth Circuit Adopts Mosaic Theory, Holds that Obtaining 'Extended' Cell-Site Records Requires a Warrant" 241
O. Kerr, "Eleventh Circuit Deepens the Circuit Split on Applying the Private Search Doctrine to Computers," Washington Post (posted Dec. 2, 2015) 241
O. Kerr, "Fourth Circuit Adopts Mosaic Theory, Holds that Obtaining 'Extended' Cell-Site Records Requires a Warrant," Washington Post (the Volokh Conspiracy) (posted Aug. 5, 2015) 241
J. Kosseff, "Should Tech Companies Be Subject to the Fourth Amendment," Crunch Network (posted Dec. 13, 2015) 242
J. Larson & J. Angwin, "Fact-Checking the Encryption Debate," ProPublica (posted Dec. 15, 2015) 242
F. Manjoo, "Police Cameras Can Shed Light, but Raise Private Concerns" 242
J.P. Murphy & A. Fontecilla, "Social Media Evidence in Criminal Proceedings: A Frontier of New Legal Issues" 242
J.P. Murphy & L.K. Marion, "Riley v. California: The Dawn of a New Age of Digital Privacy," 243
"New Contact System Makes Sure Offenders Are Never Out of Reach," 243
J. Palazzolo, "Defense Attorneys Demand Closer Look at Software Used to Detect Crime-Scene DNA," Wall St. J. A3 (Nov. 11, 2015) 243

J. Palazzolo, "NSA Phone-Data Collection Program Set for Legal Challenge 244
Peterson & E. Nakashima, "Obama Administration Explored Ways to Bypass Smartphone Encryption," *Washington Post* (posted Sept. 24, 2015) 244
K. Robinson, "Judges Try to Read Tea Leaves; What's Next for Technology at High Court?" 244
***P. Shallwani, "Tablets to Help Fight Crime"* 244**
***R.M. Thompson, The Fourth Amendment Third-Party Doctrine* 245**
J. Valentino-Devries, "Police Snap Up Cheap Cellphone Trackers," 245
E. Volokh, "What Happens If You Take the Fifth in a Civil Case? An Important California Case Law Correction," 245
"With LENS, Offender Data Quickly Reaches Officers on Beat" 245

“CRIMINAL ESI” UPDATE

February, 2016

TAGS

#Discovery Materials

#Fifth Amendment Self-incrimination

#Fourth Amendment Ex Ante Conditions

#Fourth Amendment Exigent Circumstances

#Fourth Amendment Good Faith Exception

#Fourth Amendment Particularity Requirement

#Fourth Amendment Warrant Required or Not

#Preservation and Spoliation

#Trial-Related

#Miscellaneous

#Social Media

ABBREVIATIONS

“SCA”- Stored Communications Act

“CSLI”- Cell site location information

DECISIONS – SUPREME COURT

Bullcoming v. New Mexico, 131 S.Ct. 2705 (U.S. 2011)

The petitioner had been convicted of driving while intoxicated. The principal evidence against him was a "forensic laboratory report certifying that Bullcoming's blood-alcohol concentration was well above the threshold for aggravated DWI." The analyst who signed the certification did not testify at trial. Instead, there was testimony from an analyst "who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the *** test." The New Mexico Supreme Court held that the report was "testimonial" but that the "substitute" testimony did not violate the Confrontation Clause. "The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification – made for the purpose of proving a particular fact – through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist."

#Trial Related

***Florida v. Jardines,* 133 S.Ct. 1409 (U.S. 2013)**

The Supreme Court granted *certiorari* to consider whether police officers had engaged in a "search" under the Fourth Amendment when they took a drug-sniffing dog to the defendant's front porch, the dog "alerted" to the presence of narcotics, the police then secured a warrant, and found marijuana plants inside the defendant's home. The Florida Supreme Court had suppressed the evidence. The Supreme Court affirmed: "That principle [that physical intrusion of a constitutionally protected area is a "search"] renders this case a straightforward one. The officers were gathering information in an area belonging to Jardines and immediately surrounding his house – in the curtilage of the house, which we have held enjoys protection as part of the house itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner."

#Fourth Amendment Warrant Required or Not

***Maryland v. King,* 133 S.Ct. 1958 (U.S. 2013)**

The respondent was arrested for assault in 2009. A DNA sample was taken from him through a buccal swab as part of a routing booking procedure. The DNA matched DNA taken from a rape victim in 2003. The respondent was arrested for the rape. The Maryland Court of Appeals reversed the respondent's conviction for rape, ruling that the 2009 DNA was taken as a result of an unlawful seizure. The Supreme Court reversed: "In light of the context of a valid arrest supported by

probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of his arrest gives rise to significant state interests in identifying respondent not only so that "In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of his arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment."

#Fourth Amendment Warrant Required or Not

***Maryland v. Kulbicki*, 136 S. Ct. 2 (2015)**

The defendant shot his mistress in 1993. During his 1995 trial, the State offered expert ballistics testimony. The defendant was convicted of murder. After his petition for postconviction relief had lingered for years, the Maryland Court of Appeals granted the relief on grounds of

ineffective assistance of counsel because the defendant's attorney should have found a 1991 report coauthored by the expert that raised a speculative question about the ballistics evidence. The Supreme Court summarily reversed. Among other things, the Court held that a diligent search would have been unlikely to find the report: "The Court of Appeals offered a single citation in support of its sweeping statement that the report 'was available' in 1995 – a *** Web page accessed by the Court of Appeals, apparently conducting its own Internet research nearly two decades after the trial," that indicated that the report had been distributed to public libraries in 1994. The ballistics evidence was uncontroversial at the time of trial and counsel was not obligated to look "for a needle in a haystack" in "an era of card catalogues, not a worldwide web."

#Miscellaneous

DECISIONS – FEDERAL

In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [redacted], No. BR 13-158 (FISA Ct. Oct. 11, 2013)

The court issued a "Primary Order" pursuant to Section 215 of the USA PATRIOT Act directing certain "Custodians of Records" to produce, "all call records or 'telephony metadata' created by [redacted]," on a continuing basis. In an accompanying Memorandum the court, citing *Smith v. Maryland,* 442 U.S. 735 (1979), held that, "the production of call detail records *** does not constitute a search under the Fourth amendment." The court then discussed the concurring opinions in

United States v. Jones, 132 S.Ct. 945 (2012), and concluded that, "[t"]he Supreme Court may someday revisit the third-party disclosure principle in the context of twenty-first century communications technology, but that day has not yet arrived."

#Fourth Amendment Warrant Required or Not

***In re Application for Search Warrant*, Mag. No. 09-320 (D.D.C. June 6, 2009)**

The court denied the Government's request for reconsideration. The court had refused to authorize the search of electronic devices. In denying the request, the court affirmed that mere references to use of a computer are insufficient: "Without proof of a consistent use of the computer to communicate or otherwise advance of the conspiratorial scheme, it cannot be said that the computer is being used as an instrumentality of a crime." The court also denied reconsideration of its refusal to allow a search for foreign language documents: "Many Americans (including me) grew up in bilingual homes. That alone cannot be justification to search those homes for documents in a foreign language."

#Fourth Amendment Warrant Required or Not

***In re Applications for Search Warrants for Information Associated With Email Address, Nos. 12–MJ–8119–DJW, 12–MJ–8191–DJW*, 2012 WL 4383917 (D. Kan. Sept. 21, 2012)**

The Government applied under the SCA for the issuance of warrants allowing it to obtain and search electronic communications from internet service providers. Adopting the rationale of *Warshak* (*q.v.*) to the applications, that the court held that "an individual has a reasonable expectation of privacy in emails or faxes stored with, sent to, or received through" an ISP. The court then founds that the warrants did not satisfy the particularity requirement of the Fourth Amendment because (1) all electronic communications were to be disclosed in their entirety and without any limitation based on the crimes being investigated and (2) no limits were placed on the Government review of the electronic information sought. The court denied the applications without prejudice and suggested that the Government identify "an appropriate procedural safeguard" to limit any search.

#Fourth Amendment Warrant Required or Not

***In re Application of the United States of America for Historical Cell-Site Data*, 724 F.3d 600 (5th Cir. 2013)**

At issue in this appeal was whether, "court orders authorized by the SCA to compel cell phone service providers to produce historical CSLI of their subscribers are pre se [*sic*] unconstitutional." A magistrate judge had denied three Government applications, concluding that warrantless disclosure violated the Fourth Amendment. The district court affirmed: "The records would show the date, time called, number, and location of the telephone when the call was made. These data are constitutionally protected from this intrusion. The standard under the SCA is below that

required by the Constitution."

The Court of Appeals reversed. After rejecting various objections to ruling on the merits, the court addressed the merits and analyzed the facts under this "framework:"

"cell site information is clearly a business record. The cell service provider collects and stores historical cell site data for its own business purposes, perhaps to monitor or optimize service on its network or to accurately bill its customers for the segments of its network that they use. The Government does not require service providers to record this information or store it. The providers control what they record and how long these records are retained. The Government has neither "required [n]or persuaded" providers to keep historical cell site records. [*United States v.*] *Jones*, 132 S. Ct. at 961 (Alito, J., concurring in the judgment). In the case of such historical cell site information, the Government merely comes in after the fact and asks a provider to turn over records the provider has already created."

With that analysis, the court held that the warrant requirement of the Fourth Amendment was inapplicable:

"The statute conforms to existing Supreme Court precedent. This precedent, as it now stands, does not recognize a situation where a conventional order for a third party's voluntarily created business records transforms into a Fourth Amendment search or seizure where the records cover more than some specified time period or shed light on a target's activities in an area traditionally protected from governmental intrusion. We decline to create a new rule to hold that Congress' balancing of privacy and safety is unconstitutional" (footnote

omitted).

However, the court cautioned:

"Recognizing that technology is changing rapidly, we decide only the narrow issue before us. Section 2703(d) orders to obtain *historical* cell site information for specified cell phones at the points at which the user places and terminates a call are not categorically unconstitutional. We do not address orders requesting data are from all phones that use a tower during a particular interval, orders requesting cell site information for the recipient of a call from the cell phone specified in the order, or orders requesting location information for the duration of the calls or when the phone is idle (assuming the data are available for these periods). Nor do we address situations where the Government surreptitiously installs spyware on a target's phone or otherwise hijacks the phone's GPS, with or without the service provider's help."

#Fourth Amendment Warrant Required or Not

***In re Application of U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283 (4th Cir. 2013)**

Sealed access order pursuant to the SCA was entered at pre-grand jury phase of an ongoing criminal investigation to require Twitter to turn over subscriber information to the United States concerning accounts and individuals of interest. Those individuals of interest moved to vacate and to unseal. The magistrate judge denied their motion. The subscribers then filed objections to the magistrate judge's sealing and docketing decisions. The district court overruled their objections and

the subscribers petitioned for writ of mandamus. The Court of Appeals held that there was no First Amendment right to access orders issued under 18 U.S.C. Sec. 2703(d) relevant to an ongoing criminal investigation and related to "the unauthorized release of classified documents to WikiLeaks.org" at the pre-jury phase of an ongoing trial. The Court described the 2703(d) process as "investigative, and openness of the orders [that did] not play a significant role in the functioning of investigations." found that the common law right of access to the 2703(d) order was outweighed by the government's interest in "preventing potential suspects from being tipped off, or altering behavior to thwart the government's ongoing investigation." Further, the Court concluded that the common law presumption of access was outweighed by the government's interest in continued sealing because the publicity surrounding the Wikileaks investigation."

#Discovery Materials

#Trial-Related

#Social Media

***In re Application for Telephone Information Needed for a Criminal Investigation*, No. 15-XR-90304-HRL-1 (LHK), 2015 WL 4594558 (N.D. Ca. July 29, 2015)**

The Government applied for an order under the SCA for CSLI associated with a number of "target cell phones" for 60 days before and 60 days after issuance of the order. A magistrate judge denied the application, concluding that a search warrant supported by probable cause was

required. The district court affirmed. Relying primarily on *United States v. Jones* (*q.v.*), it found that "individuals have an expectation of privacy in the historical CSLI associated with their cell phones, and that such as expectation is one that society is willing to recognize." The court also relied on concessions by the Government that, "over the course of sixty days an individual will invariably enter constitutionally protected areas, such as private residences", and that "[c]ell phones generate far more location data because, unlike the vehicle in *Jones*, cell phones typically accompany the user wherever she goes." The court also rejected the Government's reliance on the third party doctrine "because the generation of historical CSLI via continually running apps or routine pinging is not a voluntary conveyance by the cell phone user in a way those cases demand."

#Fourth Amendment Warrant Required or Not

***Application for Warrant for E-Mail Account*, Mag. No. 10-291-M-01 (D.D.C. Nov. I, 2010)**

A magistrate judge had ordered the Government to notify the subscriber or customer of an e-mail account that a warrant had been issued for its contents. Interpreting the Electronic Communications Privacy Act, the district court reversed. The district court held that the ECPA incorporated the procedural provisions of *Fed. R. Crim. P.* 41, and the rule was satisfied by serving the warrant on the ISP provider.

#Fourth Amendment Warrant Required or Not

***In re Boucher,* No. 2:06–mj–91, 2009 WL 424718 (D. Vt. Feb. 19, 2009)**

A magistrate judge had quashed a grand jury subpoena on the grounds that it violated the defendant's Fifth Amendment right against self-incrimination. In reversing the magistrate judge, the court held requiring the defendant to produce an unencrypted version of a laptop drive would not be a "compelled testimonial communication" as the Government was already aware of the existence and location of the drive and its contents (child pornography). However, the court did bar the Government from using the production to authenticate the drive or the contents.

#Fifth Amendment Self-incrimination

***Bill v. Brewer,* No. 13-15844, 2015 WL 5090744 (9th Cir. Aug. 31, 2015)**

The Phoenix Police Department sought to exclude individuals as contributors of DNA at a crime scene by taking DNA samples from them. Several police officers refused to have samples taken and their DNA was collected only after orders were secured from a State judge. Three of the nonconsenting officers filed a Section 1983 action, alleging that their Fourth Amendment rights had been violated. The district court dismissed the complaint for failing to state a claim. The Court of Appeals affirmed. "[T]he issue before us is whether the defendants 'respected relevant Fourth Amendment standards' in collecting plaintiffs' DNA." The Court of Appeals analyzed the orders and concluded that these satisfied the Warrant Requirement: The orders were issued by a neutral judge, particularly described what was to be seized and searched, and the supporting affidavits demonstrated

probable cause to believe that the evidence sought would aid in apprehension or conviction for a specific crime. The Court of Appeals also held that had been no undue intrusion: "It was hardly unreasonable here to ask sworn officers to provide saliva samples" and there was no danger of potential misuse.

Fourth Amendment Warrant Required or Not

***In re Cell Tower Records Under 18 U.S.C. 2703(D)*, No. H-15-136M, 2015 WL 1022018 (S.D. Tex. Mar. 8, 2015)**

This was an application for an order under Section 2703(d) "unusual" in that

> the targeted account is not specified; neither the phone number nor the identity of the phone's subscriber or customer are currently known to law enforcement. By obtaining the records of all wireless devices using a nearby tower at the scene of the crime, the Government hopes to identify the particular device used by the suspect and any confederates, and ultimately to enable their capture and arrest.

The court recognized a split of authority on what was sought, a "dump" of cell tower records. Nevertheless, relying on binding Fifth Circuit precedent, it granted the application, concluding the records should be characterized as "ordinary business records entitled to no constitutional protection." The court also concluded that the SCA contemplated the issuance of a single order for records for multiple accounts. However, it reduced the temporal scope of the application from one hour to ten minutes in issuing the order. Finally, the court admonished that its order had "no application to a related through very

different investigative technique using a device known as a cell site simulator, sometimes referred to as a "StingRay."

#Fourth Amendment Warrant Required or Not

***In re the Decryption of a Seized Data Storage System,* No. 13-M-449 (E.D. Wisc. May 21, 2013)**

Here, the Government renewed its application to compel an individual to decrypt a data storage system so that a search warrant could be executed for its contents. The original application had been denied because there were insufficient facts to demonstrate that the inevitable discovery doctrine applied. On the renewed application, the Government presented evidence that some of the system had been decrypted and that images of child pornography had been found, as well as other images and documents that belonged to the individual. For these reasons, and because the system was found in the defendant's residence (where he lived alone for 15 years), the court was persuaded that the individual had access to and control over the system, that the act of decryption would not be testimonial, and that the doctrine applied.

#Discovery Materials

***Doe v. Shurtleff*, 628 F.3d 1217, (10th Cir. 2010)**

In this action, the anonymous plaintiff had been convicted of sex offenses involving a minor in a United States military court. The plaintiff

challenged in the District Court a Utah statute that required him, as a resident and convicted sex offender, to provide to the Utah Department of Corrections, among other things, all "Internet identifiers." After the District Court found that the statute had no restrictions on the dissemination of information and held it unconstitutional as an infringement of the plaintiff's First Amendment right to anonymous speech, Utah amended the statute. The District Court then granted a Rule 60(b) motion and upheld the statute. On appeal, the Court of Appeals affirmed (and denied a motion for panel rehearing and rehearing *en banc*). The Court of Appeals concluded, among other things, that the amended statute was "content-neutral" and did *not* require strict scrutiny, that the statute did *not* allow unrestricted dissemination to the general public, and that the plaintiff did not have a reasonable expectation of privacy in his "online identifiers."

#Fourth Amendment Warrant Required or Not

***EEOC v. Burlington N. Santa Fe R.R.*, 669 F.3d 1154 (10th Cir. 2012)**

This case involved two job candidates were not hired by the defendant company after receiving conditional offers of employment and a medical screening procedure. The job candidates filed EEOC charges, claiming they were being discriminated against in violation of the Americans with Disabilities Act. As part of its investigation, the EEOC issued a letter to the defendant requesting "any computerized or machine-readable files … created or maintained by you . . . that contain electronic data or effecting [sic] current and/or former employees …

throughout the United States." The defendant objected to the request. The EEOC then served a subpoena and indicated in a letter to the defendant that it was broadening its investigation to include "pattern and practice discrimination," thus warranting the demand for nationwide information. After the defendant again refused to provide the information, the EEOC filed an enforcement action. The district court discharged the EEOC's show cause order and sustained BNSF's refusal to comply with the subpoena. On appeal, the Tenth Circuit noted that the EEOC may access "'any evidence of any person being investigated' so long as that evidence 'relates to unlawful employment practices … and is relevant to the charge under investigation.'" The Tenth Circuit emphasized, however that the information demanded in the EEOC's subpoena went far beyond the allegations in the underlying charge and that enforcing it may "render null the statutory requirement that the investigation be relevant to the charge." In ruling against the EEOC's efforts to give their investigation a national scope, the Court also stated that "nationwide recordkeeping data" was not relevant to individual discrimination claims "filed by two men who applied for the same type of job in the same state."

#Discovery Materials

***EEOC v. Kronos Inc.*, 694 F.3d 351 (3d Cir. 2012), as amended (Nov. 15, 2012)**

For the second time in this case, the Third Circuit addressed the enforcement of an administrative subpoena issued by the EEOC seeking to compel Kronos Incorporated ("Kronos"), a non-party to the

underlying action, to disclose information about its employment tests. The EEOC issued the disputed subpoena as part of its investigation into an allegation that a grocery store violated the ADA by failing to hire a disabled applicant after she took an employment test created by Kronos. The Third Circuit previously held that the EEOC was entitled to Kronos's data without the geographic, temporal, and topical restrictions originally imposed by the district court, except for discovery regarding racial discrimination. Kronos appealed and the Third Circuit remanded for the district court to conduct a good cause balancing test to determine if a confidentiality order was warranted. On remand, the district court expanded the scope of its original order, but again placed certain limitations on the disclosure of information related to the Kronos tests. Regarding Kronos's request for a confidentiality order, the court found there was good cause to enter a modified version of the order previously reviewed by the Third Circuit. The district court also required Kronos and the EEOC to split evenly the costs of production. The Third Circuit remanded "solely for the purpose of allowing the district court to consider how the specific limitations it ordered are tied to Kronos's justifiable fears regarding the disclosure of proprietary information." The Third Circuit also specified that it was "reversing the district court's cost-sharing order not because we necessarily disagree with the result, but to allow the court to make an individualized determination of whether the costs of production under the newly expanded subpoena are outside the scope of what Kronos can reasonably expect to bear as the cost of doing business."

#Discovery Materials

***Grady v. North Carolina,* 135 S. Ct. 1368 (2015) (*per curiam*)**

The petitioner, a convicted sex offender, was ordered to enroll in a lifelong satellite-based monitoring system. He challenged the order, arguing that it violated his Fourth Amendment right to be free from unreasonable searches and seizures. The Supreme Court held:

The State's program is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search.

That conclusion, however, does not decide the ultimate question of the program's constitutionality. The Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations. ***. The North Carolina courts did not examine whether the State's monitoring program is reasonable – when properly viewed as a search – and we will not do so in the first instance.

The court remanded for further proceedings.

#Fourth Amendment Warrant Required or Not

***In re Grand Jury Empanelled on May 9, 2014,* 786 F.3d 255 (3d Cir. 2015)**

An anonymous corporation had been held in contempt for refusing to comply with a grand jury subpoena served on its custodian of record, identified as "John Doe," the sole owner and employee of the corporation. He argued on appeal that compliance with the subpoena would violate his Fifth Amendment privilege against self-incrimination. The Court of Appeals affirmed. Doe relied on the "act of production

doctrine," which recognizes that an individual can refuse to comply when doing so would reveal something "testimonial" that might be used against him. However, the subpoena was not directed to Doe as an individual but to him as the corporate custodian. This implicated the "collective entity doctrine," which provides that an individual cannot rely on the Fifth Amendment to avoid production of corporate records because he would be acting in a representative rather than an individual capacity.

#Fifth Amendment Self-incrimination

***In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335 (11th Cir. 2012)**

John Doe was subpoenaed to before a grand jury investigating child pornography and to produce the unencrypted contents of hard drives. Doe was given immunity for the act of production but not for the Government's use of any content. Doe refused to decrypt the hard drives and was held in contempt. The Court of Appeals reversed on Fifth Amendment self-incrimination grounds. Distinguishing *Boucher* (*q.v.*), it held that, although the contents were not testimonial in nature, "decryption and production would be tantamount to testimony by Doe of his knowledge of the existence and location of potentially incriminating files." The court also held that Doe could have been compelled to turn over the unencrypted contents if it had given him appropriate immunity.

#Fifth Amendment Self-incrimination

***In re Grand Jury Subpoenas*, 627 F.3d 1143 (9th Cir. 2010)**

The United States appealed from an order quashing subpoenas on the respondent law firms. The subpoenas, issued under Fed. R. Crim. P. 17(c), sought nonprivileged materials in aid of a grand jury investigation of the firms' clients. The materials had been obtained by the firms through discovery in a private antitrust action. The Court of Appeals reversed, holding that the District Court had abused its discretion. There was no proof of "collusion between the civil suitors and the government" and the Government had not engaged in any bad faith tactics. "By a chance of litigation, the documents [in issue] had been moved from outside the grasp of the grand jury to within its grasp. No authority forbids the government from closing its grip on what lies within the jurisdiction of the grand jury."

#Discovery Materials

***Hart v. Mannina,* No. 14-1347, 2015 WL 4882405 (7th Cir. Aug. 17, 2015)**

This was a Section 1983 action brought against detectives and the Indianapolis Metropolitan Police Department. The police allowed a film crew from a TV program to follow them in the investigation of a home invasion. The plaintiff was arrested and spent nearly two years in prison awaiting trial for crimes he did not commit. The plaintiff contended that he was arrested without probable cause and that false and misleading statements were made against him. Summary judgment was granted in favor of the defendants. On appeal, the plaintiff argued, among other things, that evidence had been spoliated because raw video footage of

interviews conducted by the police that had been taken by the TV program had been destroyed. The Court of Appeals rejected this argument. "A police officer's duty to preserve evidence applies when the officer knows the evidence is exculpatory or destroys the evidence in bad faith." However, there was no evidence that the lost footage was exculpatory to the plaintiff or destroyed in bad faith.

#Preservation & Spoliation

***House v. Napolitano,* No. 11–10852–DJC 2012, 2012 WL 1038816 (D. Mass. Mar. 28, 2012)**

In this Section 1983 action, the plaintiff, who alleged that he had been targeted for supporting Bradley Manning, arrived at a Chicago airport from a vacation in Mexico, where his electronic devices were searched and seized for 59 days. He alleged that the search and prolonged seizure violated his First and Fourth Amendment rights. In ruling on a motion to dismiss by the Government defendants, the court held that the search and seizure at the functional equivalent of a border crossing was not sufficiently intrusive to trigger a need to show some level of suspicion. The court denied the motion as to the length of the seizure, finding reasonableness to be in dispute. The court also denied the motion on the First Amendment claim, rejecting the argument that its ruling on the search and seizure foreclosed an associational claim. Finally, the court declined to rule on the plaintiff's request for the issuance of an injunction to require the defendants to disclose who they had disclosed or disseminated ESI to.

#Fourth Amendment Exigent Circumstances

***Huff v. Spaw,* 794 F.3d 543 (6th Cir. 2015)**

This was a Title III action brought against a defendant for intentional interception of oral communications involving the husband and wife plaintiffs. The husband inadvertently placed a "pocket-dial call" to the defendant, who remained on the line for 91 minutes, transcribed what she heard, and used an iPhone to record a portion of the conversations. The district court granted summary judgment, holding that the plaintiffs had no reasonable expectation of privacy. The Court of Appeals affirmed in part. Applying the "reasonable expectation of privacy test" of *Katz v. United States,* 389 U.S. 347 (1967) (Harlan, J., concurring), the court held that the husband, who made the pocket-dial call to the defendant, "exposed his statements to her and therefore failed to exhibit an expectation of privacy with regard to those statements." He was aware of the risk of making such calls and took no precautions against doing so. "Huff is no different from the person who exposes in-home activities by leaving drapes open or a webcam on and therefore has not exhibited an expectation of privacy." However, the Court of Appeals reversed and remanded as to the plaintiff wife because since she "made statements in the privacy of her hotel room, was not responsible for exposing those statements to an outside audience, and was *** unaware of the exposure, she exhibited an expectation of privacy."

#Miscellaneous

***Kelly v. Rogers*, No. 1:07–cv–1573, 2012 WL 2153796 (M.D. Pa. June 13, 2012)**

In this Section 1983 action, the plaintiff recorded the defendant police officer at a traffic stop. The plaintiff was arrested for violation of a Pennsylvania wiretap law. After appeal and trial on discrete factual questions, the court held that the defendant was entitled to qualified immunity for the arrest based on erroneous advice given to him by a prosecutor but that the defendant had no reasonable basis to seize the recording device.

#Miscellaneous

***Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010)**

The Court of Appeals affirmed the entry of a preliminary injunction against a district attorney. The district attorney had threatened prosecution of minors for "sexting" unless they attended an education program. The court held that plaintiffs (a minor and her mother) were engaged in constitutionally protected activity, that the threatened prosecution was retaliatory, and that there was a causal relationship between the two.

#Miscellaneous

***In re Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued by this Court,* No. 15MISC1902, 2015 WL 5920207(E.D.N.Y. Oct. 9, 2015)**

The Government sought an order compelling Apple to assist in the execution of a search warrant by disabling the security of an Apple device lawfully seized pursuant to a search warrant. The Government "discovered the device to be locked, and have tried and failed to bypass that lock." The court questioned whether the relief sought was authorized by the Act. However, it deferred ruling to afford Apple an opportunity to address the question of burdensomeness of any order and the Government to respond. After the matter was briefed the defendant pled guilty. By letter dated October 29, 2015, the Government advised the Court that it "persists in the application."

#Miscellaneous

***Patel v. City of Los Angeles,* 738 F.3d1058, (9th Cir. Dec. 24, 2013) (*en banc*)**

The Los Angeles municipal code requires that hotel and motel owners maintain detailed records on their guests. The appellant motel owners brought a facial challenge to a code provision that authorized, "warrantless, on-site inspections of those records upon the demand of any police officer." The district court dismissed the complaint for declaratory and injunctive relief. The Ninth Circuit, sitting *en banc,* reversed and remanded. The court reasoned: (1) "Records inspections *** involve both a physical intrusion upon a hotel's papers and an invasion of the hotel's privacy interests in those papers" and constitute a "search" under the Fourth Amendment, (2) based on assumptions about the intent of the challenged provision, the court applied, "the Fourth Amendment principles governing administrative record

inspections, rather than those that apply when the government searches for evidence of a crime or conducts administrative searches of a non-public areas of a business," and (3), the provision was facially invalid because it authorized, "inspection *** without affording an opportunity to 'obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply'" (citation omitted).

#Fourth Amendment Warrant Required or Not

***Rann v. Atchison,* 689 F.3d 832 (7th Cir. Aug. 3, 2012)**

The petitioner was convicted for criminal sexual assault and child pornography in Illinois. After exhausting State remedies, he sought *habeas* relief, alleging ineffective assistance of counsel because his attorney did not seek suppression of images on digital storage devices secured without a search warrant. The district court denied the petition and the Court of Appeals affirmed. The devices had been delivered to law enforcement by the victim and her mother. They knew what images were on the devices. The subsequent search of the contents by law enforcement did not violate the respondent's Fourth Amendment right and, accordingly, his ineffective assistance of counsel claim could not prevail.

#Fourth Amendment Warrant Required or Not

***Sams v. Yahoo Inc.,* 713 F.3d 1175 (9th Cir. 2013)**

The plaintiff filed a putative class action against the defendant, alleging that its disclosure of noncontent subscriber information in response to grand jury subpoenas violated the SCA. The district court granted the defendant's motion to dismiss, concluding that the defendant was statutorily immune from suit. Affirming the district court, the Court of Appeals held that the test of "good faith reliance" under the SCA contained both an objective and subjective element. No facts were pled to give rise to a plausible inference that the defendant knew that the subpoenas were invalid and the defendant's production was objectively reasonable as the subpoenas appeared to be lawful.

The Court of Appeals also rejected the argument that liability could attach because documents had been produced before the return date of the subpoenas: "The principle Sams would apparently have us adopt would, among other things, outlaw the negotiated resolution of discovery disputes, and related cooperation among counsel to minimize inconcenience and costs to the parties."

#Fourth Amendment Good Faith Exception

***Schlossberg v. Solesbee*, 844 F. Supp. 2d 1165 (D. Or. 2012)**

Police officer defendant conducted a warrantless search of plaintiff's digital camera incident to his arrest. Plaintiff filed § 1983 claim against defendant. The court found that the warrantless search violated the Fourth Amendment. The court found that because a large volume of personal data can be stored on modern mobile devices entitling, such

devices were entitled to a higher standard of privacy. The court rejected the rationale of previous cases that held electronic devices were like "closed containers" subject to warrantless searches. Thus, absent exigent circumstances, the court held that an officer was required to obtain a warrant to search any electronic device found on a suspect. Plaintiff's motion for summary granted was granted.

#Fourth Amendment Warrant Required or Not

***In re Sealed Case,* 717 F.3d 968 (D.C. Cir. 2013)**

Government agents executed search warrants as part of a grand jury investigation. After the parties failed to reach agreement as to which seized documents could be reviewed without exceeding the scope of the warrants or breaching attorney-client privilege, motions were made pursuant to Criminal Rule 41(g) to return "any documents the government lacked authority to review." The district court denied the motions and the moving parties appealed. Addressing the only issue that was not moot – the refusal of the district court to order the parties to implement protocols to identify documents beyond the scope of the warrants – the Court of Appeals concluded that it lacked jurisdiction because there was no finality. The Court of Appeals also held that the order here was not appealable under the *Perlman* doctrine.

[Note that this decision is heavily redacted].

#Fourth Amendment Particularity Requirement

In re Search of Electronic Communications (Both Sent and Received) in the Account of Chakafattah@gmail.com at Internet Service Provider Google, Inc., **No. 14-3752 (3d Cir. Sept. 2, 2015)**

The appellant is a sitting Congressman subject to a grand jury investigation. He was advised by Google that it had received a warrant that authorized the FBI to search his personal email account. His motion to quash was denied by a district judge. The Court of Appeals affirmed. The court concluded that it lacked appellate jurisdiction under either the collateral order or the *Perlman* doctrines. The court also held that *Fed. R. Crim. P.* 41(g) did not confer jurisdiction: "Denial of a pre-indictment *** motion is immediately appealable, only if the motion is[] (1) solely for the return of property and (2) is in no way tied to an existing criminal prosecution against the movant." #Miscellaneous

In re Search of Google Email Accounts, **Nos. 3:14-mj-00352 KFM, 3:15-mc-00009-KFM, 2015 WL 1650879 (D. Alaska Apr. 13, 2015)**

The Government secured a search warrant compelling Google to produce specified content of six Gmail accounts over a limited time period. Google declined to comply, arguing that it should not be required to perform a search for the content sought. The Government then applied for a second warrant for all content, which was rejected as overbroad as it went beyond the time period of the first warrant. Google moved for relief from the first warrant. The court granted the relief sought and issued an *ex ante* order that "relieve[s] Google of any obligation to inspect content ***, while also providing the government

with full access to the content *** for which its application establishes probable cause."

#Fourth Amendment Ex Ante Conditions

#Miscellaneous

***In re Search of premises known as Three Cellphones & One Micro-SD Card*, No. L4-MJ-8013-DJW, 2014 WL 3845157 (D. Kan. Aug. 4, 2014)**

The Government submitted a search warrant application for information stored on various devices. The court denied the application because the Government did not propose a search methodology. Relying on earlier decisions, including *Riley v. California,* the court explained that "an explanation of the government's search techniques is being required in order to determine whether the government is executing its search in good faith and in compliance with the probable cause and particularity requirements of the Fourth Amendment. And a protocol is not required to accompany every type of search. It is only because of the substantial differences in the search of large amounts of electronically stored information[] that the Supreme Court discussed in *Riley,* that a search protocol is being requested."

#Fourth Amendment Particularity Requirement

#Fourth Amendment Ex Ante Conditions

***In re Search Warrants for Info. Associated with [redacted]@mac.com that is Stored at Premises Controlled by Apple, Inc.,* 25 F. Supp. 3d 1 (D.D.C. 2014)**

The magistrate judge denied the Government's application for a warrant to search the records and content of an email account: "Despite this Court's repeated prior warnings about the use of formulaic language and overbroad requests that –if granted—would violate the Fourth Amendment, this Court is once again asked by the government to issue a facially overbroad search and seizure warrant." The court's explanation included:

(1) Drafting errors in the application had "the potential to confuse the provider *** which must determine what information must be given to the government."

(2) The Government's application's "ask for the entire universe of information tied to a particular account, even if it has established probable cause only for certain information."

(3) Although the court had imposed "minimization procedures" in the past, it had warned the Government to adopt strict protocols to avoid submitting applications for "general" warrants.

(4) "To follow the dictates of the Fourth Amendment and to avoid issuing a general warrant, a court must be careful to ensure that probable cause exists to seize each item specified in the warrant application."

(5) "[I]n light of the government's repeated submission of overly broad warrants that violate the Fourth Amendment, this Court can see no

reasonable alternative other than to require the provider *** to perform the searches."

(6) The application failed to provide that the Government would "destroy all contents and records that are not within the scope of the investigation ***."

The magistrate judge denied a renewed application in its Second Memorandum Opinion and Order filed on April 7, 2014.

On August 8, 2014, a district judge vacated the order denying the renewed application and granted the application. The district judge reasoned in part:

(1) "[T]he government's search warrant properly restricts law enforcement discretion to determine the location to be searched and the items to be seized."

(2) "[T]he information contained in the [supporting] affidavit *** supports a finding of probable cause because there is a fair probability that the electronic communications and records that the government seeks, which are described in detail ***, will be found in the particular place to be searched."

(3) "[T]he procedures the government adopts for executing the search warrant comply with the Fourth Amendment and are permissible under Rule 41."

(4) "[B]ecause the government's proposed procedures comply with the Fourth Amendment and are authorized by Rule 41, there is no need for Apple to search *** and determine which e-mails are responsive ***."

(5) “Enlisting a service provider to execute the search warrant would also present nettlesome problems.”

(6) “[T]he practical realities of searches for electronic records may require the government to examine information outside the scope of the search warrant to determine whether specific information is relevant to the criminal investigation and falls within the scope of the warrant.”

(7) The Government’s presented “valid” concerns that the destruction or return of information

might implicate its *Brady* obligations or hinder its ability to introduce evidence.

#Fourth Amendment Particularity Requirement

#Fourth Amendment Ex Ante Conditions

In re Search Warrants for Info. Associated with Target Email Accounts/Skype Accounts, No. 13-MJ-8163-JPO 2013 WL 4647554, (D. Kan. Aug. 27, 2013)

The Government submitted five applications for search warrants directed to Internet service providers in aid of an investigation of various crimes. The proposed warrants sought the disclosure of information under Section 2703 of the SCA and the seizure of that information as “fruits, evidence, and instrumentalities” of the crimes.

The court denied the applications without prejudice: First, it found “the rationale of [*United States v.*] *Warshak* persuasive and therefore holds

that an individual has a reasonable expectation of privacy in emails stored with, sent to, or received through an electronic communications service provider. Accordingly, the Fourth Amendment protections, including a warrant 'particularly describing' the places to be searched and the communications to be seized, apply ***. A warrant seeking stored electronic communications such as emails therefore should be subject to the same basic requirements of any search warrant: it must be based on probable cause, meet particularity requirements, be reasonable in nature of breadth, and be supported by affidavit."

Next, the court observed that, "whether a description of a place to be searched is sufficiently particular is a complicated question because of the differences because of the differences between the physical worlds" (footnote omitted). The court then, citing *United States v. Carey,* 172 F.3d 1268 (10th Cir. 1999), for the proposition that computers often contain "intermingled documents" such that, "law enforcement must engage in the intermediate step of sorting various types of documents and then only search the ones specified in a warrant," concluded that a warrant should specify "what type of file is sought."

The court then ruled that the applications were deficient: (1) "The warrants fail to set any limits on the email communications and information that the *** provider is to disclose ***, but instead requires each Provider to email communications in their entirety and all information about the account without restriction," (2) "the warrants fail to limit the universe of *** communications and information to be turned over *** to the specific crimes being investigated," and (3) the warrants, "fail to set out any limits on the *** review of the potentially

large amount of *** communications and information *** [and] do not identify any sorting or filtering procedures ***," and (4) even assuming probable cause existed (which it did not for the preceding reasons), there were no limits on the Government's review of content.

The court made this suggestion should the applications be renewed: "While not endorsing or suggesting any particular safeguard, some possible options would be asking the *** provider to provide specific limited information such as emails containing certain key words or emails sent to/from certain recipients, appointing a special master with authority to hire an independent vendor to use computerized search techniques to review the information for relevance and privilege, or setting up a filter group or taint-team to review the information for relevance and privilege. Only with some such safeguard will the *** protection against general warrants be insured."

#Fourth Amendment Particularity Requirement

#Fourth Amendment Ex Ante Conditions

***In re the Search of Motorola Cellular Telephone*, Mag. Nos. 09-m-652 through 09-653 (D.D.C. Dec. 7, 2009)**

The Government sought the issuance of search warrants for two seized cell phones. Noting the ability of cell phones to hold vast amounts of data, that the supporting applications did not specify what information the Government sought, and that no limitations on the searches were proposed, the court found that a "general search" was being requested. The court denied the application.

#Fourth Amendment Particularity Requirement

***Sec. & Exch. Comm'n v. Huang,* No. CV 15-269, 2015 WL 5611644 (E.D. Pa. Sept. 23, 2015)**

The defendants in this insider trading civil action had been provided with smartphones by their employer. The employer owned the devices and any corporate information but allowed the defendants to create passwords. The defendants returned the devices when their employment was terminated. The employer believed that relevant information was on the devices and gave the devices to the SEC but the SEC could not access content. The defendants refused to provide the passwords on Fifth Amendment grounds and the SEC moved to compel them to do so, arguing that they were "corporate custodians in possession of corporate records" and could not assert the Fifth Amendment. The court denied the motion. It concluded that, although the content might be corporate, the passwords were "personal in nature." The court also rejected the argument that the "foregone conclusion" doctrine applied.

#Fifth Amendment Self-Incrimination

***Sennett v. United States,* 667 F.3d 531 (4th Cir. 2012)**

In this civil action brought to recover damages under the Privacy Protection Act, a search warrant was served on the plaintiff, a photojournalist identified by video surveillance as being present at a violent demonstration. Pursuant to the warrant, law enforcement

seized various electronic media from the plaintiff. The Court of Appeals affirmed an award of summary judgment against the plaintiff, concluding, among other things, that probable cause existed to believe that the defendant was engaged in criminal acts and thus fell within the "suspect exception" of the Act.

#Fourth Amendment Exigent Circumstances

In re Smartphone Geolocation Data Application, 977 F.Supp.2d 129 (E.D.N.Y. 2013)

The Government secured an arrest warrant for a doctor based on a showing that he had issued thousands of prescriptions for controlled substances to the wrong people. The doctor refused to provide his location, so the Government sought an order for "prospective geolocation data relating to the cell phone believed to be used by the physician." The order was issued and the physician located and arrested. Explaining his rationale for granting the order, the magistrate judge concluded that the Government had shown that the data sought could reasonably assist in the doctor's apprehension and that, "[i]n light of the development and general awareness of geolocation technologies, I believe that the voluntary disclosure doctrine provides the most important point in evaluating requests for prospective data." In other words, "as to prospective geolocation data, cell phone users who fail to turn off their cell phones do not exhibit an expectation of privacy and such expectation would not be reasonable in any event." The court also held that a cell phone was not a "tracking device" under the SCA.

#Fourth Amendment Warrant Required or Not

***In re Subpoenas*, 692 F. Supp. 2d 602 (W.D. Va. 2010)**

The Government served two investigative subpoenas on Abbott Laboratories "for a number of potential federal violations arising out of Abbott's impermissible off-label marketing" of a drug and for related health care fraud. After Abbott argued that the subpoenas were unduly burdensome, the Government offered to narrow the scope of the subpoenas to seek email from three people. In granting the Government's motion to compel compliance with the subpoenas as modified (which required Abbott to produce "live" e-mail and "snapshots" from backup tapes over a specific time period), the court found the subpoenas to be "reasonable" under the Fourth Amendment: The email sought was relevant to the investigation. The email was on backup tapes preserved for other litigation and Abbott had nearly $30 billion in annual sales. Moreover, "if retrieving the e-mails the government requests is as difficult as Abbott conveys, then the fault lies not so much with an overly broad governmental request as it does with Abbott's policy or practice of retaining documents (documents Abbott has been required to retain for litigation purposes) in a format that shrouds them in practical obscurity." The court also rejected Abbott's argument that it was unduly burdensome "to formulate search terms relating to the off-label marketing of other FDA approved drugs."

#Discovery Materials

***United States v. Aguiar,* 737 F.3d 251, (2d Cir. 2013)**

The defendants moved before the trial court to suppress evidence derived from a GPS device that had been placed in a vehicle without a warrant over a six-month period. The motion was denied and the defendants were convicted of drug offenses. After the convictions, the Supreme Court decided *United States v. Jones. "Jones* left open the question of whether the warrantless use of GPS devices would be 'reasonable – and thus lawful – under the Fourth Amendment [where] officers ha[ve] reasonable suspicion, and indeed probable cause' to conduct a search." On appeal, the Court of Appeals declined to address the constitutionality of the search in issue because it concluded that the good faith exception to the exclusionary rule applied: (1) the GPS device had been installed in 2009, (2) no court of appeals had held that attaching a GPS device violated the Fourth Amendment until 2010, and (3) "sufficient Supreme Court precedent existed at the time the GPS device was placed for the officers here to reasonably conclude a warrant was not necessary ***."

#Fourth Amendment Good Faith Exception

***United States v. Ahrndt*, 475 F. App'x 656 (9th Cir. 2012)**

The defendant, a previously-convicted sex offender, was charged with transportation and possession of child pornography. He moved to suppress evidence derived from his use of a wireless network to connect with the Internet. A neighbor using the same network accessed shared files of the defendant indicative of child pornography and notified the police who, with the neighbor, observed child

pornography. The police identified the defendant as a registered sex offender, accessed the network and determined its IP address after securing a search warrant, served a summons on Comcast and learned that the defendant was the subscriber for the IP address, and then secured a second warrant for media containing child pornography at the defendant's home. The defendant argued that the police violated the Fourth Amendment when the police initially accessed the defendant's files through the neighbor's computer. The court held that the defendant had a lower expectation of privacy in information broadcast over an unsecured wireless network than through a hardwired or password-protected one and that the defendant had no reasonable expectation of privacy in the file-sharing program in issue (iTunes). The court also rejected the defendant's argument that the neighbor and the police had violated the Electronic Communications Privacy Act when they accessed his network because his network was "readily accessible to the general public." Finally, the court found that the defendant had no subjective expectation of privacy: He was a "somewhat sophisticated computer user" and should have known about shared files and the unsecured nature of his network even if he did not know these facts. The Ninth Circuit reversed and remanded, holding it was clearly erroneous for the district court to find that the defendant used multi-media downloading software to share files, and from that finding to conclude that he lacked a reasonable expectation of privacy. The Ninth Circuit directed the district court to conduct further fact finding to determine whether the defendant had a reasonable expectation of privacy in his computer files. The Court also instructed the district court to evaluate whether a search occurred in light of *United States v. Jones,* 565 U.S. ———, 132 S.Ct. 945 (2012).

#Fourth Amendment Warrant Required or Not

***United States v. Albertson*, 645 F.3d 191 (3d Cir. 2011)**

The defendant pled guilty to one count of receiving child pornography and the district court sentenced him to 60 months of imprisonment and 20 years of supervised release with special conditions. On appeal, the defendant challenged, inter alia, the reasonableness of three of the special conditions of his supervised release, including a restriction on internet access and mandatory computer monitoring. The defendant argued that the special conditions were overbroad because they disproportionate to his criminal history and offense characteristics. The Third Circuit set out three factors for assessing whether a supervised release condition is overbroad: the scope of the condition with respect to substantive breadth; the scope of the condition with respect to its duration; "the severity of the defendant's criminal conduct and the facts underlying the conviction, with a particular focus on whether the defendant used a computer or the internet to solicit or otherwise personally endanger children"; and, "the proportion of a supervised release restriction to the total period of restriction (including prison time)." Applying the factors to the case, the court held that restriction prohibiting internet access unless preapproved by probation was too broad, unless the defendant has used the internet as an instrument of harm. Citing its decision in *United States v. Holm,* 326 F.3d 872, 878 (7th Cir.2003), the court reasoned that "such a ban renders modern life—in which, for example, the government strongly encourages taxpayers to file their returns electronically, where more and more

commerce is conducted on-line, and where vast amounts of government information are communicated via website—exceptionally difficult." With regard to the duration of the supervised release term, the Circuit Court found the length of the supervised release term (20 years) was relative to the defendant's age (42 years). Turning to the conduct factor, the Court stated that a key consideration -- whether the defendant used the internet "to actively contact a child and solicit sexual contact" -- favored the defendant. Finally, the "relatively short incarceration sentence" imposed on the defendant (25 years) suggested to the Court that the length of the supervised release term was reasonable. In light of these factors, the Third Circuit concluded that the internet restriction condition failed for overbreadth because it was too restrictive. The Court vacated both conditions and remanded, directing the district court to achieve its sentencing purpose through a more targeted internet restriction, as well as a monitoring requirement "that allow computer inspections and the installation of monitoring or filtering software."

#Miscellaneous

***United States v. Andres*, 703 F.3d 828 (5th Cir. 2013)**

The defendant appealed his conviction and sentence for drug conspiracy. He had been subjected to a traffic stop in Illinois. The vehicle he had been operating had been the subject of GPS surveillance from Texas to Illinois over a three-day period. Federal officers had informed Illinois police of the likely presence of drugs, but the stop was made on police observation of traffic offenses. After the stop, the

defendant acted nervously when being questioned and, after consenting to a search, a dog alerted to the presence of cocaine. On appeal, the defendant argued that the initial traffic stop was a pretext and that the search of his vehicle violated the Fourth Amendment. The Court of Appeals disagreed: The initial stop was justified based on observed traffic violations. The initial duration of the stop was reasonable. The defendant's behavior led to reasonable suspicion that justified the continued stop and the search. The Court of Appeals also rejected the defendant's reliance on *United States v. Jones,* 565 U.S. —— —, 132 S.Ct. 945 (2012). Declining to decide whether warrantless GPS are "per se unreasonable," and assuming that there was a Fourth Amendment violation, federal law enforcement had acted in an objectively reasonable manner in relying on existing precedent and reasonable suspicion of drug trafficking when the GPS device was installed.

#Fourth Amendment Warrant Required or Not

***United States v. Ayache*, No. 3:13-CR-153, 2014 WL 923340 (M.D. Tenn. Mar. 10, 2014)**

The defendants were indicted for, among other things, conspiracy to defraud the Government. They moved to suppress evidence derived from searches of their *entire* email accounts for a period of over one year. After a *Franks* hearing, the district judge struck as untrue statements in one paragraph of the affidavit submitted to the magistrate judge who issued the search warrants. Despite having stricken the untrue statements, the district judge found that probable

cause existed to search all of the accounts. The district judge rejected the argument that the warrants were overbroad given the conspiracy allegations: "Neither the facts nor the law require that a 'reasonable' search should have been limited – artificially – only to emails between *** [the defendants]." The district judge also found that the time

#Fourth Amendment Particularity Requirement

#Miscellaneous

United States v. Baez, *744 F.3d 30 (1st Cir. 2014)*

The defendant was convicted of multiple arsons. In aid of its investigation of the defendant, the Government installed, without a warrant, a GPS device in the defendant's vehicle and tracked him for almost one year in. At issue on this appeal was whether the tracking fell within the good faith exception to the Warrant Requirement. The Court of Appeals affirmed: "It is enough for us to say that what occurred in this case was not the indiscriminate monitoring that Baez describes. This was relatively targeted (if lengthy) surveillance of a person suspected, with good reason, of being a serial arsonist." Here, "the agents were acting in objectively reasonably reasonable reliance on then-binding precedent."

#Fourth Amendment Good Faith Exception

***United States v. Bah,* 794 F.3d 617 (6th Cir. 2015)**

The defendants were in a rented vehicle that had been stopped for a speeding violation. One was arrested for driving on a suspended license and the second detained after a number of credit, debit, and gift cards were found in the vehicle. They were taken to a police department, where officers—without a warrant—looked at a text message and several incriminating images on one cell phone. Again without a warrant, officers used a magnetic card reader to access information from the cards and discovered that most if not all had been stolen and re-coded. Thereafter, a search warrant was secured to search the content of the other cell phones that had been seized. The supporting affidavit did not refer to anything that had been reviewed on the one phone. The defendants were charged with various crimes and moved to suppress evidence taken from the vehicle, the cards and the phones. The motions were denied and the defendants entered conditional pleas. On appeal, they challenged the denial of their motions. The Court of Appeals affirmed: (1) The defendant passenger had no possessory interest in the vehicle and lacked standing to challenge the search of its content; (2) he did have standing to challenge the length of his pre-arrest detention, but the length was reasonable under the circumstances; (3) the scans of the magnetic strips on the cards was not a "search" because the scans were not a "physical intrusion on a constitutionally protected area" and did not violate the cardholders' reasonable expectations of privacy; (4) the reasoning of *Riley v. California* (*q.v.*) was inapplicable because the cards had little storage capacity and did not tend to store "highly personal information;" and (5) the application for the later search warrant was not tainted by the unconstitutionally obtained evidence as it was not relied on by the issuing judge.

#Fourth Amendment Required or Not

***United States v. Banks,* 556 F.3d 967 (9th Cir. 2009)**

In this pre-*CDT* decision, the Court of Appeals affirmed the defendant's conviction for child pornography-related offenses. The defendant argued, among other things, that the district court had erred in denying his motion to suppress evidence seized pursuant to a search warrant. The court held that the supporting affidavit established an adequate foundation for issuance of the warrant. There was sufficient information that the defendant was engaged in the transmission of images of minors engaged in sexually explicit conduct and expert opinion was not necessary to show how "pedophiles act in the digital age." The court also held that the warrant, which did not exclude the defendant's home-based business from any search, could not have been more specific given the nature of computer systems.

Fourth Amendment Warrant Required or Not

United States v. Bari, 599 F.3d 176 (2d Cir. 2010) (*per curiam*)

On this appeal from the revocation of the defendant's supervised release, the Court of Appeals concluded that the district judge had not committed reversible error by "conducting an Internet search to confirm his intuition regarding a matter of common knowledge." The judge had done a Google search about yellow hats to confirm his belief that a yellow hat found in the garage of the defendant's landlord was the same type as that worn by the defendant when he robbed a bank.

The Court of Appeals looked to the Federal Rules of Evidence for "guidance," although the Rules did not apply "in full" at supervised release revocation proceedings. Undertaking a plain error review, the court held that the judge had used the Internet to confirm a "common sense supposition" and that, in so doing, the judge had taken permissible judicial notice of a fact as allowed by "relaxed" Rule 201: "As the cost of confirming one's intuition decreases, we would expect to see more judges doing just that."

#Miscellaneous

United States v. Barnes, 803 F.3d 209 (5th Cir. 2015)

The defendants were convicted of various drug-related offenses. On appeal, one defendant argued, among other things, that "certain Facebook and text messages attributed to him at trial were introduced into evidence with insufficient authentication." The Court of Appeals rejected the argument:

> Holsen [a cooperating witness] testified that she had seen Hall [the defendant] use Facebook, she recognized his Facebook account, and the Facebook messages matched Hall's manner of communicating. She also testified that Hall could send messages from his cell phone, she had spoken to Hall on the phone number that was the source of the texts, and the content of the cell messages indicated they were from Hall. Although she was not certain that Hall authored the messages, conclusive proof of authenticity is not required for the admission of the disputed evidence.

The Court of Appeals also held that any error in admitted the evidence was harmless given the overwhelming evidence of the defendant's guilt.

#Trial-Related

#Social Media

***United States v. Beckett,* 369 Fed. App'x. 52 (11th Cir. 2010) (*per curiam*)**

The defendant created a fake MySpace account that appeared to belong to an underage girl and used it to contact underage boys through MySpace and Instant Messaging. He would then coerce the boys into engaging in sexual acts. After being convicted of various crimes arising out of the "scam," the defendant appealed, arguing that the trial court should have suppressed subscriber information received by law enforcement in response to "exigent circumstances" letters sent to Internet Service Providers and phone companies ("providers"). Based on the information, a warrant was secured, the defendant's computers and related media were seized, and he was arrested. A computer search revealed "a plethora of child pornography and evidence that connected the computer to conversations" with the boys. The defendant argued on appeal that no "emergency" existed under the Electronic Communications Privacy Act which justified the disclosure of subscriber information in response to mere letters. In affirming the defendant's conviction, the Court of Appeals held that the ECPA does not provide a statutory suppression remedy absent a constitutional violation. There was no Fourth Amendment violation, as the defendant

had no reasonable expectation of privacy in "identifying information transmitted during internet usage and phone calls that is necessary for the … [providers] to perform their services" (as opposed to content)—and that the defendant had entered into written agreements with the providers that prohibited use of services for illegal activities and that allowed the providers to turn over subscriber information related to such activities. The court also rejected the defendant's argument that law enforcement exceeded the scope of the warrant when the content of his computers were searched.

#Fourth Amendment Exigent Circumstances

United States v. Beckmann, 786 F.3d 672 (8th Cir. 2015)

The appellant was convicted of possession of child pornography. He was visited by two officers to confirm his address and ensure compliance that conditions that had been imposed. An officer observed a computer monitor and saw the appellant "messing with wires/cords." After being given consent to look at the monitor, additional devices, including an unconnected external hard drive, were observed. Although he was not given specific consent to do so, an officer searched the drive and uncovered evidence of child pornography. A search warrant was then secured that was to be executed on a date certain. However, the inspection did not begin until several months after the date had passed and an inventory was not filed for several years. The defendant was indicted for possession. His motion to suppress was denied in part and he entered a conditional plea thereafter. The Court of Appeals held that the consent to search did not extend to the hard drive and that the

failure to comply with the execution deadline and to make a timely return warranted concern. However, "exclusion of evidence is not the proper remedy without showing prejudice or reckless disregard" and the appellant failed to make that showing.

#Fourth Amendment Warrant Required or Not

***United States v. Berg,* No. CR10-310 RAJ (W.D. Wash. Jan. 23, 2012)**

The defendant was incarcerated pending sentencing. He requested access to a dedicated stand-alone computer at his place of detention to access discovery provided by the Government, "particularly an extensive Excel spreadsheet created by the Government which summarizes financial records." The court allowed the access, having found that "special and unusual circumstances" existed: "This case has an unusually large amount of discovery that can only be effectively reviewed on a computer. The typical availability of a computer for the defendant *** would be insufficient to review the large amounts of financial materials in time for his sentencing."

#Discovery Materials

United States v. Blagojevich,* 612 F.3d 558 (7th Cir. 2012) (*en banc)

During the criminal trial of former Illinois Governor Blagojevich, the trial judge decided not to reveal the names of the jurors until the trial ended. Media organizations moved to intervene to challenge this decision. The judge denied the motion as untimely and held the

deferred disclosure did not violate the Fourth Amendment. On an appeal brought under the collateral order doctrine, a panel of the Seventh Circuit reversed. The panel held that the judge had abused his discretion in finding the motion to be untimely. (The judge had promised the juror's that their names would not be released during trial). On the merits, the panel held that there was a presumptive right of access to the names and remanded to the judge to conduct a hearing and balance that right with the risks of releasing the names. Several Circuit judges dissented from the denial of *en banc* rehearing, criticizing the panel for amending its initial opinion during the Circuit's internal deliberations on the rehearing and contending that the panel had erred.

#Trial Related

***United States v. Borowy*, 595 F.3d 1045 (9th Cir. 2010) (*per curiam*)**

The defendant entered a conditional plea to possession of child pornography and appealed from the denial of his motion to suppress evidence. (He also appealed from a Rule 11 error). An FBI agent had conducted a keyword search on a publicly available peer-to-peer file-sharing network and, using a software program, identified images of child pornography. The agent then downloaded and viewed files from the defendant's IP address, several of which contained child pornography. The agent then secured a search warrant and seized the defendant's laptop, CDs, and floppy disks. Forensic examination revealed hundreds of child pornographic images. The Court of Appeals affirmed, holding that the defendant had no expectation of privacy in a

file-sharing network. The court also held that the defendant's "ineffectual effort" to prevent the sharing of his files did *not* create an objectively reasonable expectation of privacy. The court rejected the defendant's argument that the agent's use of the software program constituted an unlawful search, as the contents of the defendant's files were already available to the public. Finally, the court held that the agent had probable cause to download files. The court did not resolve "whether downloading a file constitutes a seizure." The court also noted that it was only presented "with the limited case of a targeted search of publicly exposed information for known items of contraband" and rejected the defendant's argument that its decision would "allow unrestricted government access to all internet communications."

#Fourth Amendment Warrant Required or Not

***United States v. Bowen,* No. 13-31078, 2015 WL 4925029 (5th Cir. Aug. 20, 2015)**

The defendant police officers shot and killed unarmed men in New Orleans during the "anarchy" that followed Hurricane Katrina. They were convicted of serious crimes but were awarded a new trial by the district court. The Court of Appeals affirmed:

> The reasons for granting a new trial are novel and extraordinary. No less than three high-ranking federal prosecutors are known to have been posting online. Anonymous comments to newspaper articles about the case through its duration. The government makes no attempt to justify the prosecutors' ethical lapses, which the court described as having created an 'online 21st century carnival atmosphere.' Not only that, but the government inadequately

investigated and substantially delayed the ferreting out of information about its in-house contributors to the anonymous postings. The district court also found that cooperating defendants called to testify by the government lied, an FBI agent overstepped, defense witnesses were intimidated from testifying, and inexplicably gross sentencing disparities resulted from the government's pleas bargains and charging practices.

Like the district court, we are well aware of our duty normally to affirm convictions that are tainted only by harmless error. In this extraordinary case, however, harmless error cannot be evaluated because the full consequences of the federal prosecutors' misconduct remain uncertain after less-than-definitive DOJ internal investigations. The trial, in any event, was permeated by the cumulative effect of the additional irregularities found by the district court. We conclude that the grant of a new trial was not an abuse of the district court's discretion.

#Miscellaneous

#Trial Materials

United States v. Bradbury, 2:14-cr-00071-PPS-APR, 2015 WL 3737595 (N.D. Ind. June 15, 2015)

The defendant posted a Facebook message about a plot to kill officials and destroy public buildings. This led to a police investigation and the issuance of search warrants for residences and the defendant's Facebook postings. After he was indicted the defendant moved to, among other things, suppress evidence derived from the searches. He argued that the warrants violated the Particularity Requirement because neither limited the scope of the searches and the Facebook warrant had no time limitation. As the court noted, the warrants

"authorize[d] precisely the type of 'exploratory rummaging' the Fourth Amendment protects against." However, the supporting affidavits, which were incorporated by reference, limited the warrants. Moreover, this was a "textbook case" for application of the good faith exception because the officers had applied for warrants—*prima facie* evidence of good faith—and had not acted dishonestly or recklessly in preparing the applications.

#Fourth Amendment Good Faith Exception

#Fourth Amendment Particularity Requirement

#Social Media

***United States v. Brooks,* No. 715 F.3d 1069 (8th Cir. 2013)**

The defendant was convicted of offenses related to a bank robbery. During the robbery, a bank teller concealed a GPS device among monies turned over to the defendant. Police and private security tracked the device. The defendant was arrested. A cell phone was seized incident to the arrest, a warrantless search revealed relevant images, a search warrant was subsequently secured, and a more thorough search conducted. The defendant unsuccessfully challenged the admission of the evidence taken from the cell phone as well as the GPS device. On appeal, the conviction was affirmed: (1) "Even if we assume that the initial search of the cell phone was improper, the subsequent search warrant satisfies both of the independent source requirements;" (2) Evidence Rule 404(b) "did not apply to the photos and video from the cell phone because the evidence was intrinsic to the charged crimes;"

(3) the probative value of the images was not substantially outweighed by the potential for unfair prejudice under Evidence Rule 403; (4) the district court has not abused its discretion by taking judicial notice under Evidence Rule 702 of the accuracy and reliability of GPS technology; (5) the GPS data constituted a business record and was admissible under Evidence Rule 803(6); and (6) the admission of the GPS data did not violate the Confrontation Clause because the data "was not created to establish some fact at trial."

#Fourth Amendment Warrant Required or Not

***United States v. Burgess,* 576 F.3d 1078 (10th Cir. 2009)**

The defendant appealed from the denial of his motion to suppress evidence of possession of child pornography. The evidence was on a laptop and two hard drives seized during the warrantless search of his motor home after a traffic stop and canine alert and searched thereafter pursuant to a warrant. In affirming, the Court of Appeals declined to adopt the Government's argument that the media could be searched under the "automobile exception" to the Fourth Amendment warrant requirement. It did question in *dicta,* however, whether the Supreme Court would treat computers differently from traditional "closed containers" because of the storage capacity of the former. Decided shortly before *United States v. Comprehensive Drug Testing, Inc.*, the Court of Appeals also stated: "It is folly for a search warrant to attempt to structure the mechanics of the search and a warrant imposing such limits would unduly restrict legitimate search objectives."

#Fourth Amendment Warrant Required or Not

***United States v. Burnett,* Crim. No. 12-CR-2332-CVE (D.N.M. Mar. 8, 2013)**

The defendant was indicted for illegally giving notice of electronic surveillance, wrongful disclosure of wire communication, and making a false statement. During discovery, the Government produced over 8,000 pages of materials on 15 CDs, including CDs secured from the office of the defendant's spouse. The defendant moved to, among other things, compel the production of forensic copies of hard drives and devices seized from the office of the defendant's spouse, formerly the head of the criminal division of the Office of the United States Attorney. The Government argued that some data had been inadvertently erased. The district court found this "unsatisfactory" and ordered the Government to take additional steps to attempt to locate the data.

[Note this statement by the district court: "[T]he Tenth Circuit has recognized the doctrine of spoliation of evidence in the civil context ***. However, the Tenth Circuit has not expressly adopted this doctrine in criminal cases ***. Even so, the Court may consider giving the jury an adverse inference instruction concerning the loss of evidence and what inferences may be drawn if the imaged files cannot be recovered"].

#Discovery Materials

***United States v. Bynum,* 604 F.3d 161 (4th Cir. 2010)**

The defendant appealed from his conviction for transportation and possession of child pornography. The defendant had been identified after an agent entered a "child-pornography online chat group administered" by Yahoo and observed an unknown person uploading photos. The Government served an administrative subpoena on Yahoo, which provided subscriber information and IP addresses. The Government located the associated ISP, which provided an email address and telephone number in response to a subpoena. The Government secured the defendant's name and address from the "subscriber information." Then, and after again observing the person in the chat group, the Government secured a search warrant for the defendant's residence, seized his laptop, and found child pornographic images. On appeal, the defendant argued that he had a reasonable expectation of privacy in the subscriber information secured through the subpoenas. The Court of Appeals disagreed. The defendant "voluntarily conveyed all this information to his internet and phone companies" and had no subjective expectation of privacy. Moreover, even if he did, "such an expectation would not be objectively reasonable." The appellate court also rejected, among other things, the defendant's argument that minor errors in the affidavit supporting the search warrant negated probable cause.

#Fourth Amendment Warrant Required or Not

***United States v. Carpenter,* No. 12-20218, 2013 WL 6385838, (E.D. Mich. Dec. 6, 2013)**

The defendants, who were alleged to act as "lookouts" for store robberies, moved to suppress cell phone data secured through orders issued under Section 270(d) of the SCA. The motion was denied: (1) "the Sixth Circuit views obtaining routine cell phone data quite differently that it does data obtained via a G.P.S. device being placed on a vehicle without a warrant" and Section 2703(d) was not unconstitutional and, (2) reasonable grounds existed to obtain the orders given the factual basis set forth in the Government's applications. (As an additional basis for denying the motion, the court found that, "the agents relied in good faith on the Act in obtaining the evidence").

The court also denied a defense motion to, among other things, bar expert testimony on the operation of cell towers. The court held that it was not obligated to hold a *Daubert* hearing and that it was, "unnecessary in light of the full briefing *** and the materials submitted ***." The court found that the proposed testimony would assist the trial of fact and was sufficiently reliable, but that the Government must lay an appropriate foundation at trial.

#Fourth Amendment Warrant Required or Not

#Fourth Amendment Good Faith Exception

#Trial Related

United States v. Carroll*, 750 F.3d 700 (7th Cir. 2014)*

The defendant pled guilty to possession of child pornography and sexual exploitation of a child. The Government secured a warrant to

search the defendant's residence and his electronic devices based on information from the victim that was five years old. "The issue *** is whether this information was too stale to create a fair probability that evidence of child pornography or sexual exploitation *** would be found on a computer or other digital storage devices *** at the time the search warrant was issued. *** we recognize that a staleness inquiry must be grounded in an understanding of both the behavior of child pornography collectors and of modern technology." The Court of Appeals affirmed the conviction because the supporting affidavit adequately addressed why five-year old images might have been retained and how deleted images might be recovered from the defendant's devices.

#Miscellaneous

***United States v. Christie*, 624 F.3d 558 (3d Cir. 2010)**

On this appeal from his conviction for various child pornography-related offenses, the defendant challenged, among other things, the admissibility of two posts he had made on a web site. In rejecting the challenge, the Court of Appeals held that the posts (which the defendant admitted he had made) were relevant and that, although the posts were "no doubt prejudicial," the district court had not abused its discretion in admitting the posts. The Court of Appeals also held that the district court had not erred in denying a motion to suppress: "no reasonable expectation of privacy exists in an IP address, because that information is also conveyed to and, indeed, from third parties, including ISPs."

#Trial Related

***United States v. Cioffi,* 668 F. Supp. 2d 385 (E.D.N.Y. 2009)**

Ruling on the defendant's motion to suppress evidence seized from his personal email account pursuant to a search warrant, which had been served and responded to by Google, the court found that the application used to establish probable cause had not been attached or incorporated into the warrant and that the warrant did not limit any emails to be seized to emails evidencing crimes. The court found that the defendant had a reasonable expectation of privacy in his personal email account. The court noted heightened concerns over the need for specificity when searching electronic information and considered several approaches to address those concerns, including that taken in *United States v. Comprehensive Drug Testing, Inc.* Rejecting the pre-search protocol approach of *CDT,* the court granted the motion as the warrant lacked specificity. The court also rejected the Government's argument s that the "good faith' and "inevitable discovery" exceptions applied.

#Fourth Amendment Warrant Required or Not

***United States v. Comprehensive Drug Testing, Inc.,* 579 F.3d 989 (9th Cir. 2009) opinion revised and superseded, 621 F.3d 1162 (9th Cir. 2010) (*en banc*)**

In what is fair to say is a controversial ruling stemming from grand jury investigations of steroid use by baseball players, the Court of Appeals

set forth detailed protocols on how the Government and magistrate judges should proceed with search warrant applications where electronic information will be sought. These include Government waiver of reliance on the plain view doctrine, use of taint teams or third parties to segregate and redact information, disclosure of the risk of destruction of information seized, use of a search protocol tailored to locate only information for which probable cause exists and examination of such information only by case agents, and destruction or return of nonresponsive information. In *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162 (9th Cir. 2010) (*en banc*), the Court of Appeals "dropped" the protocols described above and, in a concurring opinion, three judges referred to the protocols as "guidance" that "offers the government a safe harbor, while protecting the people's right to privacy and property in their papers and effects."

#Fourth Amendment Warrant Required or Not

#Discovery Materials

United States v. Conner, 521 F. App'x 493 (6th Cir. 2013)

The defendant was convicted of receipt of visual depictions of child pornography and possession of child pornography. On appeal, he argued that the district court erred in not suppressing evidence derived from an officer's use of LimeWire, a peer-to-peer file-sharing program, to access files on his computer containing the images. Affirming the conviction, the Court of Appeals distinguished *United States v. Warshak,* 631 F.3d 266 (6th Cir. 2010 (*en banc*): "*Warshak* does not control because peer-to-peer file sharing is different in kind from e-

mail, letters, and telephone calls. Unlike these forms of communication, in which third parties have incidental access to the content of messages, computer programs like LimeWire are expressly designed to make files on a computer available for download by the public, including law enforcement." This defeated any objectively reasonable expectation of privacy. The court also rejected the defendant's argument that he had a reasonable expectation of privacy based on an alleged lack of knowledge that downloaded files would be publically accessible.

#Fourth Amendment Warrant Required or Not

***United States v. Cuevas-Perez*, 640 F.3d 272 (7th Cir. 2011) cert. granted, judgment vacated, 132 S. Ct. 1534 (2012)**

Suspecting the defendant was engaged in trafficking heroin, ICE agents and city police installed a pole camera outside his home in Phoenix. When the camera recorded the defendant "manipulating" the hatch and rear door panels on his vehicle, the officers suspected the defendant of utilizing secret compartments in his vehicle to transport heroin. In an effort to conduct intensive surveillance of the vehicle, officers attached a GPS tracking device to the vehicle while it was parked in a public place. The officers programmed the unit to transmit text messages of the vehicle's whereabouts every four minutes. A day or so later, the defendant drove his vehicle from Phoenix to Illinois. The GPS unit tracked him through various states. ICE agents began conducting visual surveillance once the tracking device's batteries began running low. GPS surveillance – which lasted about 60 hours --

was terminated once the defendant arrived in Illinois. ICE agents then asked the Illinois state police to try to "find a reason" to stop the Jeep. A state police officer pulled it over for a minor traffic infraction and, during the course of the stop, a drug detecting dog alerted to the vehicle and nine packages of heroin were found hidden in the vehicle's doors and the lining of the ceiling. The defendant was arrested and charged with possessing heroin with intent to distribute. After his motion to suppress the heroin was denied, the defendant pled guilty. On appeal to the Seventh Circuit, the defendant argued that his motion to suppress should have been granted because the warrantless GPS surveillance constituted an illegal "search". The Seventh Circuit ruled that the motion to suppress was properly denied, and it affirmed his conviction. The Court reasoned that "the surveillance here was not lengthy and did not expose, or risk exposing, the twists and turns of [the defendant's] life, including possible criminal activities, for a long period. Judgment was vacated by the U.S. Supreme Court and the case was remanded to the Seventh Circuit for further consideration in light of *United States v. Jones,* 565 U.S. ———, 132 S.Ct. 945 (2012).

#Fourth Amendment Warrant Required or Not

United States v. Davis, *750 F.3d 1186 (10th Cir. 2014)*

This appeal arises out of a series of armed robberies. The FBI suspected that a particular vehicle was being used to commit the crimes and, without a warrant, installed a GPS device to track the vehicle. The vehicle belonged to the girlfriend of an accomplice of the defendant. The FBI used the tracking information to locate and arrest the

defendant and the accomplice after one robbery. The defendant was convicted of various offenses and appealed, contending that, among other things, evidence found in the vehicle should have been suppressed under *United States v. Jones.* The Court of Appeals affirmed: "The warrantless attachment and use of the GPS device was the Fourth Amendment violation—the poisonous tree—that allowed agents to locate, stop, and seize evidence from the car in which Mr. Davis was riding—the tainted fruit. *** Mr. Davis does not allege a possessory interest or reasonable expectation of privacy in *** [the] girlfriend's car; the district court found he had neither. Because the poisonous fruit was planted in someone else's orchard, Mr. Davis lacks standing to challenge its fruits." The Court of Appeals declined to address the good faith exception to the Warrant Requirement.

#Fourth Amendment Warrant Required or Not

United States v. Davis*, 573 F. App'x 925 (11th Cir. 2014), vacated and* en banc *rehearing granted*

The defendant was convicted of armed robbery and other offenses. At trial, the Government introduced into evidence CSLI from cell service providers that placed the defendant and his codefendants near the locations of the robberies. The evidence was secured through an order issued under the SCA. The defendant objected to the admission evidence, arguing that his Fourth Amendment rights were violated by the warrantless "search" of the CSLI. The district court overruled the objection. On appeal, the defendant, among other things, pressed his objection. The Court of Appeals agreed with the defendant:

(1) Although *United States v. Jones* was distinguishable, "it concerned location information obtained by a technology sufficiently similar to that furnished in the cell site information to make it clearly relevant to our analysis."

(2) "[T]he Fourth Amendment protection against unreasonable searches and seizures shields the people from the warrantless interception of electronic data or sound waves carrying communications."

(3) "[C]ell site data is more like communications data than it is like GPS information. That is, it is private in nature rather than being public data that warrants privacy protection only when its collection creates a sufficient mosaic to expose that which would otherwise be private."

(4) "Davis has not voluntarily disclosed his CSLI to the provider in such a fashion as to lose his reasonable expectation of privacy."

However, the Court of Appeals affirmed the conviction under the good faith exception to the exclusionary rule: Law enforcement acted in good faith reliance on an order, that order was a "judicial mandate" to conduct the search in issue, and there was no "governing authority affecting the constitutionality of this application of the Act."

#Fourth Amendment Warrant Required or Not

#Fourth Amendment Good Faith Exception

***United States v. Davis,* 785 F.3d 498 (11th Cir. 2015) (*en banc*)**

The defendant was convicted of a series of armed robberies. A panel of the Eleventh Circuit held that a court order issued pursuant to the SCA, 18 U.S.C. Section 2703(d), for CSLI that linked the defendant to the robberies violated the Warrant Requirement. Sitting *en banc*, the Court of Appeals construed the matter before it as follows:

> On appeal, Davis argues the government violated his Fourth Amendment right by obtaining historical *** [CSLI] from MetroPCS's business records without a search warrant and a showing of probable cause. Davis contends that the SCA, as applied here, is unconstitutional because the Act allows the government to obtain a court order compelling MetroPCS to disclose its historical *** [CSLI] without a showing of probable cause. Davis claims the Fourth Amendment precludes the government from obtaining a third-party's business records showing historical *** [CSLI], even for a single day, without a search warrant issued to that third party.
>
> In the controversy before us, there is no GPS device, no physical trespass, and no real-time or prospective cell tower location information. This case narrowly involves only (1) government access to the existing and legitimate business records already created and maintained by a third-party telephone company and (2) historical information about which cell tower locations connected Davis's cell calls during the 67-day time frame spanning the seven armed robberies.

The *en banc* Court reversed the panel decision:

> In sum, a traditional balancing of interests amply supports the reasonableness of the [] 2703 order at issue here. Davis had at most a diminished expectation of privacy in business records made, kept, and owned by MetroPCS; the production of those records did not entail a serious invasion of any such privacy interest, particularly in light of the privacy-protecting provisions of the SCA; the disclosure of such records pursuant to a court order authorized by Congress served several substantial governmental interests; and, giving the strong

presumption of constitutionality applicable here, any residual doubts concerning the reasonableness of any arguable 'search' should be resolved in favor of the government. Hence, the [] 2703(d) order *** comports with applicable Fourth Amendment principles and is not constitutionally unreasonable.

Alternatively, the court held that "the prosecutors and officers here acted in good faith and, therefore, under the well-established *Leon* exception, the district court's denial of the motion to suppress did not constitute reversible error."

There were a number of concurring and dissenting opinions.

#Fourth Amendment Good Faith Exception

#Fourth Amendment Warrant Required or Not

United States v. Deppish, *944 F. Supp. 2d 1211 (D. Kan. 2014)*

Acting on a tip from Russian law enforcement about two photo albums on a Russian image board site, the Government secured a warrant to search an email account belonging to the defendant to search for child pornography. There were no temporal limitations on the warrant. The Government performed a "filtered, keyword search" of the email in the account but did not locate any child pornography. The defendant was then interviewed and he admitted that a minor depicted in the albums looked like his granddaughter. Then, based on information from the defendant's stepdaughter, the Government secured a warrant to search the defendant's home and seized electronic devices. He moved to suppress evidence derived from both warrants. The district court denied the motions:

(1) Probable cause existed for the warrants because the images met the definition of “sexually explicit conduct” under the controlling statute.

(2) There was a sufficient nexus between the criminal activity on the image board site and the defendant’s email account.

(3) There was a sufficient nexus between the criminal activity and the defendant’s home.

(4) The Particularity Requirement was satisfied because, although the warrant sought disclosure of the entire account, it “limited seizure to instrumentalities and evidence tending to show and identify persons engaged in sexual exploitation of children.”

(5) “Defendant complains that the particular search methodology employed *** was overbroad but *** offers no alternative search methods that would protect his interests while permitting a search of the *** account.”

(6) “A temporal limitation was not reasonable because child pornography collectors tend to hoard their pictures for long periods of time.”

(7) The good faith exception to the Warrant Requirement would apply in any event.

(8) There was no basis to conduct a *Franks* hearing.

#Fourth Amendment Particularity Requirement

#Fourth Amendment Good Faith Exception

#Miscellaneous

***United States v. Diamreyan*, 684 F.3d 305 (2d Cir. 2012) (*per curiam*)**

The defendant was convicted of wire fraud. His sentence was based on findings that he played a "managerial role" in the fraud and that it involved five or more participants. He appealed, arguing, among other things, that the sentence was unreasonable. The Court of Appeals affirmed. The findings were based on email from an email account that the defendant used for over ten years and which he had exclusive access to.

#Trial Related

***United States v. Djibo*, No. 15 CR 88 (SJ)(RER), 2015 WL 9274916 (E.D.N.Y. Dec. 16, 2015)**

Acting on information from a "cooperator," the defendant was stopped for a border inspection as he prepared to fly out of the United States. He was found to be carrying an iPhone5 and was asked for its phone number and password, both of which he provided. The defendant was then arrested for drug-related offenses and read his *Miranda* rights. He moved to suppress evidence derived from a warrantless "peek" at the content of his phone as well as a later search. The court found that (1) the defendant was in custody at the time he provided the number and the password and those statements should be suppressed as he had not been "*Mirandized*;" (2) the peek led to incriminating information which should be suppressed for the same reason; and (3) although the Government did secure a warrant to search the phone a second time, that search should be suppressed as the "fruit of the poisonous tree," specifically, the peek. The Government argued it would have "inevitably

been able to hack the phone using IP-BOX." The court rejected this argument as it found that technology was unreliable.

#Fourth Amendment Warrant Required or Not

#Miscellaneous

***United States v. Drew,* 259 F.R.D. 449 (C.D. Cal. 2009)**

In this matter of first impression arising out of postings on a website by the defendant and others that led to a minor's suicide, the court held that the intentional breach of an Internet website's terms of service could not survive a constitutional "vagueness" challenge and be punished under a provision of the Computer Fraud and Abuse Act.

#Miscellaneous

***United States v. DSD Shipping,* Crim. No. 15-00102-CG-B (S.D. Ala. Sept. 2, 2015)**

The Coast Guard bordered a tanker when it docked in response to an email from a crewman that the crew had installed a pipe that allowed oily water to be discharged. The Coast Guard conducted a warrantless search and, among other things, seized electronic media. Thereafter, the Coast Guard secured a warrant to search the media and seized incriminating data. The district court denied the defendant owner's motion to suppress evidence derived from the warrantless search of the tanker and from the search of the media. The court found that there was no expectation of privacy in the areas of the vessel searched

and, even if there was, probable cause existed to conduct a "stem to stern" search. The court also rejected the applicability of *City of Los Angeles v. Patel* (*q.v.*) to the search of a vessel. The court then rejected the challenge to the warrant. The court noted that "a temporal restriction appears to be an element of determining particularity of data seized, but the case law does not indicate temporal restrictions are mandatory requirements." The court found that temporal restrictions had been incorporated by reference into the warrant through attachments, which also limited the scope of the search and, that in any event, the good faith exception to the Warrant Requirement would apply.

#Fourth Amendment Good Faith Exception

#Fourth Amendment Particularity Requirement

#Fourth Amendment Warrant Required or Not

***United States v. Durdley,* 2010 WL 916107 (N.D. Fla. Mar. 11, 2010)**

The defendant was indicted for distribution and possession of child pornography. He moved to suppress evidence seized pursuant to a search warrant. The defendant was employed by a public entity as a paramedic. While working, he accessed a computer owned by the entity. When the defendant left, he left a thumb drive in the computer. A supervisor opened the thumb drive and related ESI. A police officer arrived and conducted a warrantless search and seizure of the thumb drive. After an interview, the defendant was arrested, a State search warrant was issued, and hardware and software was seized from the

defendant's residence. In denying the motion to suppress, the court found that the defendant had inadvertently shared his ESI with the users of the public computer and that the supervisor had not acted as a law enforcement officer in accessing the ESI. Moreover, the warrantless search by the officer did not exceed that of the supervisor. Thus, he had no reasonable expectation of privacy. The court also held that the inclusion of erroneous information in the search warrant did not negate probable cause.

#Fourth Amendment Warrant Required or Not

***United States v. Epstein,* No. CR 14-287 FLW, 2015 WL 1646838 (D.N.J. Apr. 14, 2015)**

The defendants in this kidnapping prosecution moved to suppress CSLI and other location information obtained from third party providers pursuant to a Section 2703(d) order issued by a magistrate judge. The defendants argued that the information could only be secured pursuant a search warrant. The court denied the motion:

Jones and *Riley* are distinguishable from this case because the facts here do not concern the search or seizure of a cell phone, or the content of any communication. Rather, the subscriber information provided by the third party cell phone service providers was cell site location data from their historical databases. Indeed, these were business records created and maintained by the service providers, which are not entitled to protection under Defendants' Fourth Amendment rights.

The court also held, in the alternative, that the evidence would be admissible in any event under the good faith exception to the Warrant Requirement.

#Fourth Amendment Good Faith Exception

#Fourth Amendment Warrant Required or Not

***United States v. Espinal-Almeida,* 699 F.3d 588 (1st Cir. 2012)**

Defendants appealed their drug conspiracy conviction. One argued, among other things, that data from a GPS device should not have been admitted. The device had been seized from a mothership and its content loaded into software which produced a track of the vessel that was admitted in both hard copy and electronic form. Rejected the defendant's argument, the Court of Appeals held that (1) there was a sufficient chain of custody to authenticate the device as having been the one taken from the vessel and (2) there was sufficient testimony about the processes used by both the GPS and the software to authenticate ("adequately, if not extensively") the data itself. The court also rejected the argument that authentication required expert testimony: "The issues surrounding the processes employed by the GPS and software, and their accuracy, were not so scientifically or technologically grounded that expert testimony was required to authenticate the evidence, and thus the testimony of [], someone knowledgeable, trained, and experienced in analyzing GPS devices, was sufficient."

#Miscellaneous

***United States v. Esquivel-Rios,* 725 F.3d 1231 (10th Cir. Aug. 2, 2013)**

This description is worth quoting in full:

"Garbage in, garbage out. Everyone knows that much about computers: you give them bad data, they give you bad results. There was a time when the enforcement of traffic laws depended on officers lying in wait behind billboards watching cars flow past. Today, officers nearly as often rely on distant computer databases accessed remotely from their dashboards, stopping passersby when the computer instructs. But what if the computer turns out to be a good deal less reliable than the officer's eagle eye? What if the computer suggests you've broken the law only because of bad data — garbage in, garbage out? Today's case requires us to wrestle with these questions for the first time, bringing the Fourth Amendment face-to-face with Charles Babbage."

The defendant's was stopped by a Kansas trooper described to be, "a regular before this court." The trooper decided to verify an out-of-state temporary registration tag. "Because of – and only because of – the dispatcher's 'no return' report, Trooper Dean *** stopped *** [the vehicle]. After a brief discussion, the trooper sought and received permission to conduct a search," which yielded a secret compartment containing drugs and led to the defendant's arrest. The defendant challenged the search on Fourth Amendment grounds. The motion was denied because the "no return" report justified the stop. The defendant was convicted on federal drug changes and, on appeal, challenged the denial of his motion.

The Court of Appeals reversed and remanded: (1) "This court and others have regularly upheld traffic stops based on information that the

defendant's vehicle's registration failed to appear in a *** database – at least when the record suggested no reason to worry about the database's reliability," but (2) "the dispatcher replied not only that the tag yielded a 'no return' response ***. The dispatcher also added that *'Colorado temp tags usually don't return.'* This led to questions about the reliability of the database, including, (1) was the information available "'particularized evidence' that supplied *** some *** reason to think" that the van might be involved in a crime and, (2) how the Colorado database functioned. There were also questions about the trooper's credibility as a witness. The court remanded for further proceedings.

#Fourth Amendment Warrant Required or Not

***United States v. Farkas*, 474 F. App'x 349 (4th Cir. 2012)**

In this appeal from his fraud conviction, the defendant argued, among other things, that the district court violated his Sixth Amendment right to assistance of counsel when it denied his fourth motion for a continuance. In this motion, the defendant cited the need to review new discovery that had been added to the electronic database created by the Government, as well as "the ongoing invocation of privilege by a number of legal and accounting firms," which he argued prevented the disclosure of potentially exculpatory materials. The Court of Appeals disagreed, noting that the Government "had provided considerable assistance to defense counsel in reviewing documentary discovery production, including instituting an open file policy and holding regular meetings."

#Trial Related

***United States v. Farlow,* 2009 WL 4728690 (D. Me. Dec. 3, 2009)**

The court declined to suppress evidence of child pornography seized from a computer pursuant to a search warrant. Before the warrant had issued, the defendant had been communicating with a minor (actually a New York City police officer) over the Internet while speaking with a police officer in Maine, who secured a first warrant during the communications. A second warrant followed the search of the defendant's computer when Maine was searching for non-pornographic images and came upon child pornography. Rejecting the defendant's reliance on *Comprehensive Drug Testing,* ("Even the most computer literate of judges would struggle to know what protocol is appropriate in any individual case"), the court denied the motion. The warrant was not overbroad but was limited in scope to evidence of crimes under investigation and the plain view doctrine applied.

#Fourth Amendment Warrant Required or Not

***United States v. Fluker,* No. 11-1013 (7th Cir. Sept. 26, 2012)**

The defendants were convicted of mail and wire fraud. On appeal, one argued, among other things, that email introduced by the Government to rebut a defense had not been properly authenticated. Citing FRE 901(a), the Court of Appeals held that there was sufficient circumstantial evidence to make a prima facie showing that the email was authored by a particular person. The court also rejected the

defendant's argument that the email was inadmissible hearsay: The email had not been offered to prove the truth of the matter asserted but, instead, to show context and rebut the defense.

#Trial Related

***United States v. Frenchette,* 583 F.3d 374 (6th Cir. 2009)**

In this appeal from an order suppressing evidence seized pursuant to a search warrant, the defendant had paid for a one-month subscription to a child pornography web site, but the district court found that the subscription was over a year old and "stale," thus not supporting probable cause. In reversing, the Court of Appeals held that the supporting affidavit demonstrated the likely continued presence of child pornography on the defendant's computer despite the passage of time and the presence of the defendant at an address identified with the subscription.

#Fourth Amendment Warrant Required or Not

***United States v. Galpin,* 720 F.3d 436 (2d Cir. 2013)**

The defendant entered a conditional guilty plea to, among other things, production of child pornography. Before the plea, the district court had denied the defendant's motion to suppress all the evidence gathered pursuant to a search warrant, finding that, although the warrant was overbroad and probable cause was lacking, the warrant was severable and images found during the execution of the warrant were in plain

view. On appeal, the Court of Appeals held that, (1) the warrant was facially overbroad, as there was no probable cause to believe that the defendant possessed or produced child pornography, and (2) the district court failed to develop a record to support its findings related to severability and plain view. The Court of Appeals vacated the judgment and remanded for further proceedings, during which the district court was directed, if appropriate, to address the good faith exception to the exclusionary rule under *Leon.*

[Note the following from the decision: "Where, as here, the property to be searched is a computer hard drive, the particularity requirement assumes even greater importance. As numerous courts and commentators have observed, advances in technology and the centrality of computers in the lives of average people have rendered the computer hard drive akin to a residence in terms of the scope and quantity of private information it may contain" (footnote omitted)].

#Fourth Amendment Particularity Requirement

United States v. Ganias, ***755 F.3d 125 (2d Cir. 2014),*** **en banc** ***rehearing granted (2d. Cir. June 29, 2015)***

In 2003, the Army secured a search warrant in connection with an investigation of the defendant's business. It did not seize computers but, instead made forensic mirror images of the hard drives, "including files beyond the scope of the warrant, such as files containing Ganias' personal financial records." In 2004, based on evidence derived from paper records it also seized, the IRS joined the investigation and was given copies of the imaged hard drives. Both agencies extracted files

that were within the scope of the warrant but did not purge or delete non-responsive files. In 2005, the investigation expanded into possible tax violations. In 2006, two-and-a-half years after the images had been made, the Government secured a warrant to search for the defendant's personal financial records. "Because Ganias had altered the original files shortly after the 2003 warrant, the evidence obtained in 2006 would not have existed but for the Government's retention of those images." The defendant was indicted for tax evasion. He moved to suppress the evidence derived from the 2006 search. The motion was denied. He was found guilty and appealed.

The Court of Appeals vacated the conviction on Fourth Amendment grounds. It began with a restatement of the applicable law:

(1) "In light of the significant burdens on-site review would place on both the individual and the Government, the creation of mirror-images for off-site review is constitutionally permissible in most instances, even if wholesale removal of tangible things would not be."

(2) "The off-site review *** is still subject to the rule of reasonableness."

(3) "Even where a search and seizure violates the Fourth Amendment, the Government is not automatically precluded from using the unlawfully obtained evidence in a criminal prosecution."

The Court of Appeals applied the law to the facts and concluded:

(1) "This combination of circumstances enabled the Government to possess indefinitely personal records of Ganias that were beyond the

scope of the [2003] warrant while it looked for other evidence to give it probable cause to search the files."

(2) Without some independent basis for its retention of those documents in the interim, the Government clearly violated Ganias' Fourth Amendment rights by retaining the files for a prolonged period of time and then using them in a future criminal investigation."

(3) "If the Government could seize and retain non-responsive electronic records indefinitely, so it could search them whenever it later developed probable cause, every warrant to search for particular electronic data would become, in essence, a general warrant."

(4) The Government acted unreasonably and "could not have had a good-faith belief that the law permitted them to keep the non-responsive files indefinitely."

The Court of Appeals also considered the defendant's juror misconduct claim "because the increasing popularity of social media warrants consideration of this question." One juror had posted comments about the trial and became a Facebook "friend" of another juror. The defendant's motion for a new trial was denied. The Court of Appeals affirmed the denial of that motion but recommended that cautionary instructions be given both at the start of a trial and at the beginning of deliberations.

#Fourth Amendment Warrant Required or Not

#Fourth Amendment Good Faith Exception

#Trial Related

#Social Media

***United States v. Gatson,* No. 13-705, 2014 WL 7182275 (D.N.J. Dec. 16, 2014)**

The defendant was indicted for crimes arising out of a scheme to burglarize homes and convert stolen goods into cash. Among other things, he moved to suppress evidence derived from searches of various electronic devices because the warrants did not include a sufficient search protocol. Noting that the Third Circuit had declined to adopt any particular procedures for searches of devices, the court found that the warrants were narrowly tailored and denied the motion. The court also denied the defendant's motion to suppress evidence obtained from his Instagram webpages: "law enforcement agents used an undercover account to become 'friends' with Gatson. Gatson accepted the request *** law enforcement officers were able to view photos and other information ***. No search warrant is required for the consensual sharing of this type of information."

#Fourth Amendment Ex Ante Conditions

#Fourth Amendment Particularity Requirement

#Fourth Amendment Warrant Required or Not

#Social Media

***United States v. Gatson,* No. 2:13-CR-705 (WJM), 2015 WL 5920931 (D.N.J. Oct. 9, 2015)**

The Government intended to introduce CSLI at trial through an FBI agent that would show that the defendant's cell phone was in the general location of the burglaries. He moved for a *Daubert* hearing to determine whether a Government witness was qualified to testify at trial about his analysis of the CSLI. The court denied the motion as the reliability of the agent's testimony was "firmly established" because it had been "widely accepted across the country" and the testimony would be offered only to show general rather than precise location.

Trial-Related

***United States v. Graham,* 2008 WL 2098044 (S.D. Ohio May 16, 2008)**

The defendants, indicted for tax violations, moved to dismiss the indictment on Speedy Trial Act grounds. Voluminous electronic information had been produced by the Government on a rolling basis. The information was tainted and incomplete. Defense counsel had been unable to manage review of that information. Faulting the Government, defense counsel, and itself, the court dismissed the indictment without prejudice.

#Discovery Materials

#Trial Related

United States v. Graham, No. 12-4659, 2015 WL 4637931 (4th Cir. Aug. 5, 2015)

The appellants were convicted of offenses arising out of a series of armed robberies. On appeal, they challenged the admission of evidence derived from CSLI over a 221-day period obtained from a third-party service provider pursuant to 2703(d) orders. The Court of Appeals rejected the argument that the privacy policy of the provider disproved any expectation of privacy because (1) the policy only spoke of collection by the provider rather than disclosure to others and (2) there was no evidence that the appellants read or understood the policy. Over a "spirited" dissent, the court then held:

> The government conducts a search under the Fourth Amendment when it obtains and inspects a cell phone user's historical CSLI for an extended period of time. Examination of a person's historical CSLI can enable the government to trace the movements of the cell phone and its user across public and private spaces and thereby discover the private activities and personal habits of the user. Cell phone users have an objectively reasonable expectation of privacy in this information, its inspection by the government, therefore, requires a warrant, unless an established exception applies.

The court rejected the applicability of the third-party doctrine because cell phone users do not "convey" CSLI; rather, "[t]he service provider automatically generates CSLI in response to connections made between the cell phone and the provider's network, with or without the user's active participation." The court also held that the good faith exception to the Warrant Requirement applied because the government "reasonably relied on the SCA in exercising its option to seek a [] 2703(d) order rather than a warrant."

The appellants also challenged the admission of testimony related to the CSLI:

(1) The court found no abuse of discretion in allowing lay testimony about the "range of operability" of cell sites because it required "no greater than minimal technical knowledge."
(2) Although the court was "troubled" by other testimony that "went into technical detail" and appeared to be expert in nature, the admission was harmless error because, "[a]ll that really matters in that the cell site had a particular range of connectivity and that the phone connected to a cell site at a particular time—facts established through *** records and admissible portions of *** testimony."
(3) There was no abuse of discretion in allowing lay testimony regarding the creation of maps based on the CSLI because it required "minimal technical knowledge or skill."

#Warrant Requirement Good Faith Exception

#Warrant Requirement Warrant Required or Not

#Trial Materials

United States v. Halliburton Energy Services Inc., **No. 13-cr-00165 (E.D. La. Sept. 12, 2013) ("Joint Memorandum in Support of *** Guilty Plea Pursuant to Cooperation Guilty Pleas Agreement")**

This criminal action arose out of the Government's investigation into the Deepwater Horizon oil disaster in the Gulf of Mexico. The defendant agreed to pled guilty to "intentionally causing damage

without authorization to a protected computer" in violation of 18 U.S.C. Sec. 1030(c)(a)(5)(A). The facts as described in the Joint Memorandum included that, "HESI's Cementing Technology Director, acting without HESI's authorization, intentionally ordered the deletion of computer-generated Displace 3D models related to the Malcondo well created in the weeks following the blowout ***, despite having been previously directed by a HESI executive to preserve material ***."

#Preservation & Spoliation

***United States v. Heckman,* 592 F.3d 400 (3d Cir. 2010)**

The Court of Appeals reversed the imposition of special conditions on a convicted child pornographer, included one that imposed an unconditional lifetime ban on Internet access by the defendant. Distinguishing *United States v. Thielemann,* the court noted that the defendant's conviction involved the "transmission of child pornography rather than the direct exploitation of children." Regardless of whether the defendant was a "serial offender" (which he was), there were other less restrictive conditions, which could control his behavior.

#Miscellaneous

***United States v. Hock Chee Koo*, 770 F. Supp. 2d 1115 (D. Or. 2011)**

Three defendants were charged with conspiring to commit wire fraud in violation of 18 U.S. Code § 1343, economic espionage in violation of

18 U.S. Code § 1832, and computer fraud in violation of 18 U.S. Code § 1030(a)(4). A defendant named Wu had not appeared in the case. Soutavong worked in the sales department of a manufacturer and distributor of after-market auto, Wu worked for a subsidiary in China, and Khoo was a former employee, who worked in warehouse and shipping. After Wu and Soutavong were fired from the company, the owner ("Hoffman") of the company took Wu's laptop to the FBI. According to the court, the FBI "had no idea [that owner] had seized Wu's laptop" when it "made an image of the laptop" using forensic software (the "Forensic Image") and an image using nonforensic software (the "Nonforensic Backup" The FBI kept these *images,* but returned the actual laptop and the Backup Image to Hoffman on November 20, 2006." The defendants were indicted on August 19, 2009, and as noted above, Khoo and Soutavong moved to exclude the Nonforensic Backup and the Forensic Image. The defendants were indicted on August 19, 2009, and Khoo and Soutavong moved to exclude images of Wu's laptop and external hard drive, claiming neither image was an accurate copy of "Wu's computer *before it was seized.*" The defendants argued that the images should be excluded for lack of authentication, as required by Rule 901 of the Federal Rules of Evidence. In response, the prosecution said it intended "to offer the images as duplicates of what the FBI took into custody, and [did] not intend to offer" them "as proof of what was on Wu's computer before it was taken by Hoffman and Hansen." The district court denied the defendants' motion with respect to both images "if the government only intends to offer the Images as proof of what it obtained from Hoffman." The district court added, however, that the image Nonforensic Backup could be offered "to prove some of the contents of

the laptop, if the government introduces it with appropriate testimony or circumstantial evidence to prove its authenticity." Finally, the court held that the Forensic Image could not be offered to prove the contents of the laptop Wu possessed. The court characterized the backup image made with the nonforensic software as best evidence and properly authenticated for purposes of proving what government had taken into custody, even if government intended to argue that it contained content that was on computer prior to its seizure. With regard to the image made with the forensic software, such an image was properly authenticated for purposes of proving what government had taken into custody, but was not properly authenticated for purposes of showing what was on computer prior to its seizure.

#Trial Related

***United States v. Hoffman,* No. 13-107 (DSD/FLN), 2013 WL 3974480 (D. Minn. Aug. 1, 2013)**

A police officer used a computer program to scan peer-to-peer file-sharing networks. The scanning led to suspected child pornography files and logs of IP addresses that shared the files. The defendant was identified through his IP address and a warrant was issued for his residence. He moved to suppress the evidence obtained as well as statements he made while the warrant was being executed. A magistrate judge recommended the motion be denied. The district judge agreed, concluding, among other things, that "the knowing use of a file-sharing program defeats any claim of a reasonable expectation of privacy in the files shared on the network."

#Fourth Amendment Warrant Required or Not

***United States v. Hopson,* Crim. Case No. 12-cr-00444-LTB, 2014 WL 4375726 (D. Colo. Sept. 4, 2014)**

The defendant was indicted for various child pornography-related offenses. He moved pre-trial to, among other things, bar expert testimony about being the owner and primary user of a computer and digital media and his erasure of ESI. The court reserved ruling until trial, when it would require a foundation about the witness' "qualifications to testify, based on his experience and training in the examination of computer devices," and that "the process by which he derived his opinions is reliable and based on sufficient facts and/or data."

#Trial Materials

***United States v. Huart,* 735 F.3d 972 (7th Cir. 2013)**

The defendant had been released from federal prison to a halfway house. The house rules barred the possession of a cell phone and provided that all belongings would be searched and inventoried. Staff found that the defendant had a cell phone on which there were images of child pornography. The FBI took the phone, secured a search warrant, found the phone to be password-protected, unlocked the phone, and located the images after the date on which the warrant specified that the search was to have been conducted. The defendant's motions to suppress were denied and he entered a conditional guilty plea tom possession of child pornography. His convictions were

affirmed on appeal. The halfway house rules, "which Huart implicitly agreed to obey, demonstrate that he had surrendered any expectation of privacy in the contents of his cell phone, and that society was not prepared to recognize any such expectation." The Court of Appeals also rejected the defendant's reliance on *United States v. Jones*: "It was not a trespass for the *** Staff to seize contraband ***. Moreover, even if *Jones* applied ***, it would establish only that a search within the meaning of the Fourth Amendment occurred, not that it was unreasonable."

Although it concluded that the defendant had no reasonable expectation of privacy, the court did comment on his argument that the "late" search by the FBI was "essentially warrantless:"

"We do note that, under Federal Rule of Criminal Procedure 41(e)(2)(B), a warrant for electronically stored information is executed when the information is seized or copied—here, when the *** staff seized the phone. Law enforcement is permitted to decode or otherwise analyze data on a seized device at a later time. Huart provides no reason to doubt that Rule 41(e)(2)(B) would defeat his contention, if reached."

#Fourth Amendment Warrant Required or Not

***United States v. Jarman*, No. CRIM.A. 11-38-JJB, 2015 WL 4644307 (M.D. La. Aug. 4, 2015)**

The defendant requested, and thereafter secured an order, for the production of mirror images of three hard drives seized by the Government. The Government eventually delivered the images but not

in "their current state at the time of the request." The Government then produced the images in different formats. Although the court found the Government's conduct "troubling," it declined either to dismiss the indictment or to suppress evidence derived from the hard drives because the defendant had not requested production in any particular format and the conduct had not violated any order. However, the court did afford the defendant the opportunity to "cross-examine the examiner and challenge his credibility regarding what he did during the imaging process."

#Discovery Materials

#Trial-Related

United States v. Jenkins, ***No. 3:13-cr-30125-DRH-11, WL 2933192 (S.D. Ill. 2014) vacated in part, 3:13-CR-30125-DRH-11, 2014 WL 4470609 (S.D. Ill. 2014)***

In this post-*Riley* decision, the defendant moved to suppress evidence derived from the warrantless search of his cellular phones after his vehicle was stopped by police and he was arrested. The court granted the motion as no exigent circumstances existed.

#Fourth Amendment Exigent Circumstances

***United States v. Jenkins*, 2012 WL 5868907 (E.D. Ky. Nov. 20, 2012)**

In this First Amendment case, the newspaper moved to intervene, to set aside a statute's prohibition of contact with jurors, for access to

juror names and addresses, and for an order of the court to release information of willing jury members from *U.S. v. Jenkins* and to permit contact with them. The newspaper argued that the statute which allows courts to limit interaction with jurors was unconstitutional because of its burden on the First Amendment. The district court denied all of the newspaper's motions except its motion for an order of the court to release the information of willing members of the jury and to permit contact with willing jurors. The court reasoned that the statute did not provide a blanket rule prohibiting jurors from speaking to the media. The district court stated that it would contact the jurors in writing to inform them of their right to refrain from speaking with the media, and if they were willing to speak to the media and communicated that willingness to the court, the court would provide their information to the newspaper.

#Trial-Related

#Miscellaneous

***United States v. Johnston,* 789 F.3d 934 (9th Cir. 2015), *petition for cert. filed,* (U.S. Aug. 6, 2015) (No. 15-5642)**

The defendant was convicted of child pornography-related offenses. The government secured a warrant in 2006 to search his computer but performed more extensive reviews of its content in 2011 after the defendant rejected a plea deal. He argued on appeal, among other things, that a latter review exceeded the scope of the warrant. The Court of Appeals disagreed because the search methods were related directly to the scope of the warrant and the agent was "not digging

around in unrelated files or locations that might have prompted the need for a second warrant."

#Fourth Amendment Particularity Requirement

#Fourth Amendment Warrant required or Not

***United States v. Jones*, 939 F.Supp.2d 6 (D.C. 2013)**

In *Jones,* the Supreme Court held 9-0 that the warrantless and extended 28-day GPS surveillance of a motor vehicle violated the Fourth Amendment. There were three separate opinions, none of which commanded a majority of the Court. One proceeded on a trespass theory, another on the duration of the surveillance, and the third with the premise that technology might require reexamination of Fourth Amendment principles. On remand, the District Court held that the defendant was not entitled to relief under the SCA because the Act does not provide a suppression remedy. The court also concluded that the good-faith exception to the exclusionary rule applied. Law enforcement officers had reasonably relied on the then-existing state of the law (which was "completely uncharted") and on the orders issued by judicial officers that authorized the surveillance.

#Fourth Amendment Warrant Required or Not

#Fourth Amendment Good Faith Exception

***United States v. Katakis*, 21 F. Supp. 3d 1081 (E.D. Cal. 2014)**

At his trial for, among other things, obstruction of justice in violation of 18 U.S.C. Section 1519, the Government presented evidence that the defendant deleted email through the use of "DriveScrubber" software and by manual means. The defendant was convicted. The court granted the defendant's post-trial motion for judgment of acquittal: "Although the jury heard extensive and complicated evidence regarding the *** charge and the government resorted to every theory possible, none of the evidence was sufficient for the jury to find beyond a reasonable doubt that Katakis knowingly destroyed or concealed the emails with the intent to obstruct an FBI investigation that he knew of or contemplated."

#Trial Related

***United States v. Katakis,* No. 14-10283 (9th Cir. Aug. 31, 2015)**

The defendant had been indicted under 18 U.S.C. Section 1519 for obstruction of justice based on his apparent attempts to destroy ESI relevant to a criminal investigation against him. The jury found him guilty. The trial judge threw out the verdict because of insufficient evidence. The Court of Appeals affirmed: "The Government's theory of liability collapsed during trial, and the Government now raise several alternative theories to try and rescue the conviction. The evidence was insufficient to show that Katakis actually deleted electronic records or files. Further, proving Katakis moved emails from an email client's inbox to the deleted items folder does not demonstrate Katakis actually concealed those emails within the meaning of [] 1519."

#Miscellaneous

#Trial Related

***United States v. Kernell*, 667 F.3d 746 (6th Cir. 2012)**

The defendant was convicted of obstruction of justice (18 U.S.C. Sec. 1519) for deleting electronic information related to hacking then-Governor Sarah Palin's email account. On appeal, he argued that the statute was unconstitutionally vague. First, the Court of Appeals rejected the Government's argument that the defendant lacked standing to make a facial challenge -- he did *not* actual knowledge of an FBI investigation into the hacking. Turning to the merits, the court held that (1) the statute requires that a defendant act with specific intent, (2) the statute does not have a "nexus" requirement, (3) the "in contemplation" requirement is unambiguous, and (4) the reach of the statute is not limited to those that have a pre-existing legal duty to retain information. The conviction was affirmed.

#Preservation and Spoliation

***United States v. Kilbride,* 584 F.3d 1240 (9th Cir. 2009)**

The defendants were convicted of various crimes (including several related to obscenity) arising out of their sending unsolicited bulk email ("spam") advertising adult websites. On appeal, they challenged, among other things, the jury instructions on "contemporary community standards." Rejecting this challenge, the Court of Appeals held that no precise geographic of the relevant community was required. The court also held that "a national community standard must be applied in

regulating obscene speech on the Internet, including obscenity disseminated via email," but that, given the unsettled state of the law at the time, the trial court had not committed plain error by failing to give that charge.

#Trial-Related

***United States v. Kim,* Crim. Action No. 13-0100 (ABJ), 2015 WL 2148070 (D.D.C. May 8, 2015)**

The Government seized the individual defendant's laptop before he boarded a flight from Los Angeles to Korea. It shipped the laptop to San Diego for a forensic examination. The hard drive was copied and searched without a warrant. Evidence was found that incriminated the defendant and he and his corporation were indicted for export control violations. Later, the Government secured a warrant to search the laptop, which was never executed. The defendants moved to suppress the evidence derived from the warrantless search. The court rejected the argument that this was a border search for which a warrant was not required and granted the motion:

The search of the laptop began well after Kim had already departed, and it was conducted approximately 150 miles away from the airport. The government engaged in an extensive examination of the entire contents of Kim's hard drive after it had already been secured, and it accorded itself unlimited time to do so. There was little or no reason to suspect that criminal activity was afoot at the time Kim was about to cross the border, and there was little about this search – neither its location nor its scope nor its duration – that resembled a routine search at the border. The fundamental inquiry under the Fourth Amendment is whether the invasion of the defendant's right to privacy in his papers and effects

is reasonable under the totality of the circumstances, and the Court finds that it was not.

"Since there were no exigent circumstances present ***, if the search was not a 'border' search ***, then the failure to obtain a warrant requires suppression."

#Warrant Requirement Warrant Required or Not

***United States v. King*, 604 F.3d 125 (3d Cir. 2010)**

The defendant appealed from a sentence following a conditional guilty plea to interstate transportation to engage in sex with a minor (and under truly reprehensible facts). Law enforcement had gained entry to the defendant's residence with an arrest warrant for another resident. When that resident was arrested, she consented to the seizure of her computer. The defendant objected, contending that the hard drive belonged to him. The district court denied a motion to suppress evidence secured after this initial seizure. As stated by the Court of Appeals, "[t]hese facts present a novel question of law: when an owner of a computer consents to its seizure, does that consent include the computer's hard drive even when it was installed by another who claims ownership to it and objects to its seizure." Answering "yes," the court held that a computer was a "personal effect," and that the defendant relinquished any privacy in the hard drive when he placed it in a computer shared with another.

#Fourth Amendment Particularity Requirement

***United States v. Kinison,* 710 F.3d 678 (6th Cir. 2013)**

The Government appealed from the district court's granting of the defendant's motion to suppress images and videos of child pornography. The defendant's girlfriend had gone to the police after she had received disturbing text messages from the defendant. With the girlfriend's consent, her phone was searched and the images and videos downloaded. After the girlfriend stated that the defendant was viewing these on his home computer, a search warrant was secured for the defendant's home. The supporting affidavit included the results of the search of the phone. During the course of the search, the defendant's cell phone was seen in plain view in his vehicle and a warrant secured to search the phone's contents. Reversing the district court, the Court of Appeals held that, (1) the police were not required to conduct further investigations to determine the girlfriend's veracity and reliability, (2) there was a sufficient nexus between the property to be searched and the alleged crime, (3) probable cause existed for both warrants. The Court of Appeals also held that, in any event, the good faith exception applied.

#Fourth Amendment Particularity Requirement

#Fourth Amendment Good Faith Exception

***United States v. Ladeau,* 2010 WL 1427523 (D. Mass. Apr. 7, 2010)**

This criminal action began after the RCMP arrested a person who posted child pornography on an online network. Eventually, the Government secured the IP address for another person who

participated in the network and, through an administrative subpoena, identified the defendant, secured a search warrant, and seized child pornography. The defendant moved to suppress, arguing that he had a reasonable expectation of privacy because he used software intended to limit public access to the network. In denying the motion, the court found that the defendant had no *objective* expectation of privacy, as others could access the network and disseminate information about him. The court also found, among other things, that probable cause existed to seize evidence of child pornography in any form.

#Fourth Amendment Exigent Circumstances

***United States v. Lang,* 78 F.Supp.3d 830 (N.D. Ill. 2015)**

The defendants were charged with violations of the Animal Enterprise Terrorism Act. The Government secured a 2703(d) order for the disclosure of CSLI from two cell phones seized from a vehicle in which the defendants were travelling at the time of their arrest. Thereafter, the Government secured a warrant to search the content of the phones. The Government then moved for a 2703(d) order to obtain CSLI from a third phone used by a defendant through which mostly text messages were exchanged with one of the seized phones. The defendant challenged the motion, arguing that the Warrant Requirement applied. The court relied on the third-party doctrine in rejecting this argument. The court also found that the affidavit submitted in support of the motion established reasonable grounds to believe that the CSLI was relevant and material to an ongoing criminal investigation. In reaching this conclusion, the court relied on, among

other things, a pamphlet seized at the time of arrest that contained a "Security Primer" describing how to avoid cell phone tracking.

#Fourth Amendment Warrant Required or Not

***United States v. Lawing*, 703 F.3d 229 (4th Cir. 2012)**

The defendant was convicted of possession of ammunition by a convicted felon. A confidential informant told the police that someone named "Drew" was selling cocaine. Based on information the CI provided, the police stopped the defendant's vehicle. To confirm that he was "Drew," the police dialed a telephone number that the CI used to reach "Drew." The defendant's cell phone rang, confirming to the police that he was Drew. A resulting search found a weapon and shells. On appeal, the defendant argued that the district court erred in denying his motion to suppress the evidence derived from the stop and search. The Court of Appeals affirmed, concluding, among other things, that the defendant's cell phone was not the subject of a search.

#Fourth Amendment Warrant Required or Not

***United States v. Lichtenberger,* 786 F.3d 478 (6th Cir. 2015)**

The defendant was arrested for failure to register as a sex offender at the home he shared with his girlfriend. After the arrest, the girlfriend hacked into the defendant's laptop, discovered images of child pornography, and contacted the police. She showed some of the images to an officer, who viewed some of the images. The officer then

seized various media and secured a warrant. The defendant was charged with child pornography-related offenses. The district court granted his motion to suppress evidence derived from the warrantless search and from the warrant and the Government appealed. The Court of Appeals concluded that the private search doctrine did not justify the officer's search because it exceeded the search conducted by the girlfriend. There was no "virtual certainty" that the officer's search would not tell him only what he had been told by the girlfriend. Now was there any exigent circumstance that justified the warrantless search by the officer

#Fourth Amendment Exigent Circumstances

#Fourth Amendment Warrant Required or Not

***United States v. Little*, 365 F. App'x 159 (11th Cir. 2010)**

The defendants produced and sold sexually explicit videos that were marketed online at sexually explicit websites. The defendants were convicted of obscenity-related offenses based on the trailers and on DVDs purchased through the websites. On appeal, the Court of Appeals rejected the defendants' argument (among others) that the "contemporary community standards" for defining obscenity was unconstitutional as applied to the Internet. Rejecting *United States v. Kilbride,* the Eleventh Circuit held that the community standards of the trial court (the Middle District of Florida) applied.

#Miscellaneous

***United States v. Lizarraga-Tirado,* 789 F.3d 1107 (9th Cir. 2015)**

The defendant was arrested along the Mexican border and charged with illegal reentry into the United States. At trial, he disputed whether he was in the United States at the time of his arrest. An agent testified that she had contemporaneously recorded the coordinates of the defendant's arrest through a GPS device. The Government offered into evidence a Google Earth satellite image which included an automatically-generated "tack" and its coordinates. The defendant objected to the introduction of the image on hearsay grounds. The trial court overruled the objection and the defendant was convicted. On appeal, he challenged the admissibility of both the image and the tack. The Court of Appeals held that the image itself, like a photograph, made no "assertion" and was not hearsay. Turning to the tack and the accompanying coordinates—which did make an assertion—the court held that there was no "statement" because a computer program rather than a person made the tack. The court observed that there was no authentication-based challenge to the evidence. If there had been one, the proponent of the Google-Earth-generated evidence would have to establish Google Earth's reliability and accuracy. That burden could be met, for example, with testimony from a Google Earth programmer or a witness who frequently works with and relies on the program. ***. It could also be met through judicial notice of the program's reliability ***.

[Note: The Court of Appeals did its own *ex parte* research and took judicial notice that the tack was automatically generated by Google Earth once its program was given the GPS coordinates by the court].

#Trial Related

***United States v. Lowe,* 795 F.3d 519 (6th Cir. 2015)**

The defendant appealed his child pornography-related conviction. He conceded that a laptop found in his home contained images and video files containing child pornography. The evidence against him allowed a juror to reasonably infer certain facts but, "without improperly stacking inferences, no juror could infer from such limited evidence of ownership and use that James [the defendant] knowingly, downloaded, possessed, and distributed the child pornography found on his laptop." Two others shared the defendant's home and could have been responsible for at least some of the images. Moreover, there was no reasonable basis for a juror to determine whether the defendant or one of the others knowingly possessed the child pornography. "In sum, the evidence *** fell well short of what we have found sufficient to convict in other cases involving multiple users of a single device."

#Trial Related

***United States v. Mann*, 592 F.3d 779 (7th Cir. 2010)**

The defendant entered a conditional guilty plea of possession of child pornography and appealed the denial of his motion to suppress evidence of the pornography. The State of Indiana had secured a warrant to search for evidence of the crime of voyeurism (the defendant had installed a video camera in a women's locker room). Several months after the defendant's computers had been seized, an

officer used, among other things, a "forensic tool kit" to search the computers and discovered child pornography on files "flagged" by the kit as containing child pornography. Several months thereafter, the officer searched another computer using the kit and found more child pornography. Accepting the district court's findings of fact that the officer was searching for evidence of voyeurism, the Court of Appeals rejected the appeal. Distinguishing precedent and relying in part on *United States v. Burgess*, the court held that the execution of the search was reasonable: "Undoubtedly the warrant's description serves as a limitation on what files may reasonably be searched. The problem with applying this principle to computer searches lies in the fact that such images [of women in locker rooms] could be nearly anywhere on the computers." The court rejected the argument that use of the kit was unreasonable *per se,* although the court held that the officer exceeded the scope of the warrant when he opened the flagged files. The court severed the evidence from those files. The court also rejected the defendant's reliance on *Comprehensive Drug Testing: "*we are inclined to find more common ground with the dissent's position that jettisoning the plain view doctrine entirely in digital evidence cases is an 'efficient but overbroad approach.' " The court was also "skeptical of a rule requiring officers to always obtain pre-approval from a magistrate judge to use the electronic tools necessary." Instead, the Court of Appeals cautioned those "involved in searches of digital media to exercise caution to ensure that warrants describe with particularity the things to be seized and that searches are narrowly tailored to uncover only those things described." The court also found "troubling" the officer's failure to stop the search and apply for a new warrant when he uncovered evidence of child pornography. The court also

expressed “distaste” for the timeline of the search.

#Fourth Amendment Particularity Requirement

***United States v. Meregildo,* 920 F.Supp.2d 434 (S.D.N.Y. 2013)**

In this prosecution for racketeering activity, one defendant entered into a cooperation agreement. A codefendant moved to compel the Government to provide log-in information for a Facebook account made by the cooperator under an alias while in prison, arguing that he was a member of the prosecution team and that his posts were *Brady* materials. The court denied the motion, holding that the cooperator was not part of the team and that the Government did not have the posts in its possession. In any event, the moving defendant had a full set of the posts.

#Discovery Materials

#Social Media

***United States v. Miller,* 594 F.3d 172 (3d Cir. 2010)**

After the defendant was convicted of possession of child pornography, the trial court imposed a life term of supervised release as well as special conditions that, among other things, barred the defendant from accessing the Internet without prior approval and requiring him to submit to monitoring of his computer activities. Relying on, among other decisions, *United States v. Thielemann,* the Court of Appeals vacated, concluding that the lifetime restriction on access was

excessive under the facts. On remand, the trial court was directed that any "new conditions of supervised release should integrate a more focused restriction on internet access with the requirement of computer monitoring into a comprehensive, reasonably tailored scheme."

#Miscellaneous

United States v. Mitchell, **No. 2:12-cr-00401-KJM (E.D. Ca. Sept. I, 2015)**

The defendant was charged with knowing receipt of child pornography. A magistrate judge compelled the Government to provide the defendant with a mirror image of the media seized subject to a protective order that allowed access only to his defense team and experts. The district judge reversed because, notwithstanding *Fed. R. Crim. P.* 16, the Adam Walsh Act barred the relief sought as long the Government made relevant materials "reasonably available" and the defendant had "ample opportunity" to inspect the materials. The district judge found that the defendant had both.

#Discovery Materials

United States v. Molina-Gomez, **781 F.3d 13 (1st Cir. 2015)**

The defendant was subjected to a secondary examination when he arrived in Puerto Rico from Columbia. He had made three short trips to Columbia in several months, gave odd and suspicious answers to

routine questions, and his phone contained text messages about various monetary transactions. His belongings were returned after the examination other than a laptop and a Sony Playstation, which were detained for further examination when a dog "alerted" to the laptop. The items were dissembled 22 days later and bags were found inside that tested positive for heroin. The defendant was indicted for possession with intent to distribute. He moved to suppress the heroin on Fourth Amendment grounds and enter a conditional plea after the motion was denied. The Court of Appeals affirmed the validity of the search. The airport was the functional equivalent of a border and, absent a non-routine search, the border search exception to the Warrant Requirement applied. Even assuming that the search was non-routine, reasonable suspicion existed to justify it. Moreover, the 22-day delay was not unreasonable under the circumstances.

#Warrant Requirement Warrant Required or Not

***United States v. Montgomery,* 777 F.3d 269 (5th Cir. 2015)**

The defendant was stopped for traffic violations. He was arrested when a frisk for weapons revealed cocaine. His smartphone was seized. The defendant later asked for an officer's assistance in erasing "naked images" from the phone that he did not want his father to see. In doing so, the officer saw images of an underage nude female. The defendant was indicted for knowing receipt and possession of child pornography. The district court denied the defendant's motion to suppress and he was convicted. On appeal, he challenged the constitutionality of the warrantless search. The Court of Appeals affirmed: "We hold that the

pornography on the cell phone was obtained by Montgomery's consent, which was the product of an intervening act of free will on Montgomery's part that purged the taint of any alleged constitutional violation."

#Fourth Amendment Warrant Required or Not

United States v. Mulcahey, **No. CR 15-10112-RGS, 2015 WL 9239755 (D. Mass. Dec. 17, 2015)**

The defendants moved to suppress evidence found on computer hard drives seized from their business premises. They argued that the warrant in issue was defective because it only authorized seizure and that a second warrant was required to search content. The court rejected this argument because the warrant clearly authorized both. The defendants also argued, relying on *Riley v. California,* that the warrant was defective because it did not impose conditions on any off-site search of content. The court rejected this argument for two reasons: (1) *Riley* was premised on a warrantless search and a warrant had been issued in the matter *sub judice* and (2) the defendants failed to identify "exactly what the conditions limiting the search might have been or how they would be applied as a practical matter." The court did observe: "It is not that the desirability of conditions restricting the search of computers has not occurred to judges reviewing warrants like this one."

#Fourth Amendment Ex ante Conditions

#Fourth Amendment Warrant Required or Not

***United States v. Muniz*, 2013 WL 391161 (S.D. Tex. Jan. 29, 2013)**

The Government secured a Section 2703(d) order compelling a cell-phone service provider to disclose historical cell-site location information ("CSLI") for a phone used by the defendant. The defendant moved to suppress, arguing that the warrantless disclosure violated the Fourth Amendment. In denying the motion, the court observed that, "[i]t is not yet settled whether the government needs probable cause and a search warrant to obtain CSLI, or whether it may do so through the statutory subpoenas authorized under 18 U.SC. Sec. 2703(d), which requires a less demanding 'reasonableness' standard." However, the court did not resolve that question. Instead, it relied on the good faith exception to the warrant requirement and concluded that, "[i]n light of the unsettled law in this area, and the explicit statutory provision for obtaining CSLI by subpoena, it was objectively reasonable for law enforcement and the magistrate judge to believe that Muniz's CSLI had no Fourth Amendment implications."

#Discovery Materials

#Fourth Amendment Warrant Required or Not

***United States v. Nosal,* 676 F.3d 854 (9th Cir. 2012) (*en banc*)**

The defendant had been employed by an executive search firm. After he left employment, he convinced other employees to help him start a competing business. The employees used log-in information to download confidential information from the firm's database and transfer that information to the defendant. The employees were

authorized to use the database, but the firm had a policy that prohibited the disclosure of confidential information. The defendant was indicted for, among other things, violations of the Computer Fraud and Abuse Act. The district court dismissed the CFAA counts, relying on *LVRC Holdings LLC v. Brekka,* 581 F.3d 1127 (11th Cir. 2009), which narrowly construed the phrases "without authorization" and "exceeds authorized access" under the CFAA. On interlocutory appeal, the Court of Appeals affirmed: "The government's interpretation would transform the CFAA from an anti-hacking statute into an expansive misappropriation statue."

#Miscellaneous

***United States v. O'Keefe,* 537 F. Supp. 2d 14 (D.D.C. 2008)**

The court "borrowed" from the Federal Rules of Civil Procedure to address the adequacy of searches performed in discovery in a criminal proceeding and suggested that experts qualified under Fed. R. Evid. 702 would be required to testify about search methodology.

#Discovery Materials

***United States v. Perez,* Crim. Action No. 14-611 2015 WL 3498734 (E.D. Pa. June 2, 2015)**

The defendant was indicted for child pornography-related offenses. He moved to bar the Government from introducing evidence obtained during the search of his computer and three thumb drives seized

pursuant to a warrant. The search was conducted using forensic examination software which, the defendant argued, exceeded the scope of the warrant. The court rejected this argument and found that the use of the software to scan the contents in their entirety to identify and segregate the files sought into a viewable format did not exceed the scope. The court also rejected the defendant's argument that a search of extracted files exceeded the scope because the examining agents only "previewed and/or opened a limited, filtered set of extracted files to determine whether they contained evidence of child pornography" and only limited information was made available for substantive review.

#Fourth Amendment Particularity Requirement

***United States v. Phaknikone*, 605 F.3d 1099 (11th Cir. 2010)**

On an appeal from a conviction for, among other things, armed bank robbery, the Court of Appeals held that the trial court had erred in admitting into evidence the defendant's MySpace postings. The postings constituted "classic evidence of bad character" and were inadmissible under Fed. R. Evid. 404(b). However, given the overwhelming evidence of the defendant's guilt, the error was harmless.

#Trial-Related

***United States v. Pierce,* 785 F.3d 832 (2d Cir. 2015) *petition for cert. filed*, (U.S. June 24, 2015) (No. 15-5018)**

The defendants appealed their convictions for various offenses arising out of their membership in a violent street gang. Among other things, defendant Colon challenged the admission of an incriminating rap video and images of tattoos posted on a third person's Facebook page secured pursuant to a 2703(d) order. Colon argued that the SCA was unconstitutional because it did not permit him to obtain like content. However, his attorney had received the content of the page through a private investigator. The Court of Appeals rejected the argument: "Colon possessed the very contents he claims the SCA prevented him from obtaining, and his suggestion that there could have been additional exculpatory material in the *** [content] is purely speculative."

#Miscellaneous

#Trial Related

#Social Media

***United States v. Pineda-Moreno*, 591 F.3d 121 (9th Cir. 2010)**

The Government installed mobile tracking devices on the defendant's vehicle while it was parked on a public street, in a public parking lot, and his driveway. The government used the information to track the defendant from a marijuana field. The defendant entered a conditional guilty plea to manufacturing marijuana after the district court denied his motion to suppress. On appeal, the defendant argued that his Fourth Amendment rights were violated. The Court of Appeals held that the defendant's vehicle was within the curtilage of his home when two

devices were installed. However, since he took no steps to exclude the public from the driveway, the defendant had no reasonable expectation of privacy in it. The court also held that the defendant had no reasonable expectation of privacy when his vehicle was parked in public spaces. Finally, distinguishing *Kyllo v. United States* (which considered the use of thermal imaging technology to "search" with the cartilage of a home), the court rejected the argument that the use of "new" technology to track the location of the defendant's vehicle was a impermissible search. The court took note that several state Supreme Court decisions reached the opposite conclusion under their respective state constitutions. Judgment was later vacated by the U.S. Supreme Court, and the case remanded to Ninth Circuit for further consideration in light of *United States v. Jones,* 132 S.Ct. 945 (2012).

#Fourth Amendment Warrant Required or Not

***United States v. Qadri,* 2010 WL 933752 (D. Haw. Mar. 9, 2010)**

One defendant moved (a second time) to dismiss the indictment and superseding indictment for violation of the Speedy Trial Act. The defendant had been charged with, among other things, wire fraud. The indictments came nearly three years apart. ESI from other thirty hard drives and three servers was in issue. Although the Government did not respond to defense communications about production "expeditiously," the Government did produce a substantial number of documents and copied the hard drives for the defendant. There also appeared to be a problem with the defendant's ability to review the content of the servers. The defendant had consented to various continuances and had

not established prejudice. The court denied the motion: “It appears that the delay in this case may be attributed at least in part to the nature of electronic discovery, the complex nature of the alleged crimes, and the necessity of coordinating various branches of government in the investigation.” The court also denied the defendant’s request for an evidentiary hearing.

#Discovery Materials

United States v. Ransfer, *743 F.3d 766 (11th Cir. Jan. 28, 2014) Opinion Revised and Superseded by United States v. Ransfer, 749 F.3d 914 (11th Cir. 2014).*

The defendants were convicted of robberies under the Hobbs Act and other crimes. They appealed, challenging, among other things, “the admission of evidence resulting from the installation and use of a GPS tracking device without a warrant to determine the location of a Ford Expedition that was used in the commission of several robberies.” An informant led the police to several of the defendants and the investigation established the use of the vehicle in the robberies.

The Court of Appeals affirmed. Prior to *United States v. Jones,* binding precedent in the Eleventh Circuit established that the warrantless installation of an electronic tracking device on a vehicle did not violate the Fourth Amendment when the police had reasonable suspicion. “There is no doubt of reasonable suspicion *** based on the thorough

police investigation ***. Accordingly, it was reasonable for the police to rely on this long-standing, clear precedent ***."

#Fourth Amendment Good Faith Exception

United States v. Raymond, 2009 U.S. Dist. LEXIS (N.D. Okla. Sept. 16, 2009)

In this child pornography prosecution, the court denied the defendant's request for access to images on a seized computer. The Government had mirror-imaged the hard drive and made the mirror image available to the defendant's expert. The expert contended that he could not locate all of the allegedly illegal images from among the 14.000 in total on the mirror image. The court held that the Adam Walsh Act superseded Fed. R. Crim. P. 16 and barred the Government from reproducing child pornography in response to a discovery request as long as materials were made "reasonably available" to a defendant. Here, the allegedly illegal images were made available for inspection by defense counsel. The court rejected the expert's suggestion that the mirror image had been stripped of metadata. The Government agreed to make available to the expert on CDs the "missing" images, although these remained in the possession of the Government. Finally, the court directed the parties to confer about Government production of redacted images for use by the defendant in subpoenaing information from Web site owners.

#Discovery Materials

***United States v. Rigmaiden,* No. CR 08-814-PHX-DGC, 2013 WL 1932800 (D. Ariz. May 8, 2013)**

The defendant was indicted for, among other things, mail and wire fraud. He was located and arrested, in part, by tracking the location of an aircard connected to a laptop computer allegedly used to perpetrate the crimes. Having found the location, the Government secured a search warrant for a computer located there. The defendant, proceeding *pro se,* moved to suppress. The court denied the motion, concluding, among other things: (1) The defendant secured the aircard, purchased the computer and rented the location through fraud and hence could not have a objectively reasonable expectation of privacy in any of these; (2) assuming that the SCA had been violated by the Government in some way, suppression was not an available remedy any such violation; (3) historical cell-site records could be obtained under the SCA; (4) the reasoning of *United States v. Jones* did not support suppression because making calculations from cell-site data was not analogous to attaching a GPS device to a vehicle; (5) the defendant had no reasonable expectation of privacy in addresses of email messages sent from the computer that were conveyed to a third party provider; and (6) the warrant for the aircard tracking satisfied the particularity requirement of the Fourth Amendment. The district court also rejected the argument made to the defendant (and an intervenor) that, "because cell-site simulators are a new and potentially invasive technology, the government was required to include a more detailed description in the warrant application."

#Fourth Amendment Warrant Required or Not

***United States v. Robinson,* 781 F.3d 453 (8th Cir. 2015)**

The defendant was convicted of wire fraud and federal program theft. On appeal, he challenged, among other things, the warrantless installation of a GPS device on his vehicle in 2010. The Court of Appeals affirmed the denial of his motion. The device was installed in 2010, before *United States v. Jones* (*q.v.*) was decided. Evidence derived from the device was admissible pre-*Jones* based on then-binding Supreme Court precedent. The agents who installed the transmitter acted in objectively reasonable reliance on that precedent. The good faith exception to the Warrant Requirement applied.

#Fourth Amendment Good Faith Exception

***United States v. Rubin/Chambers, Dunhill Ins. Servs.,* 825 F. Supp. 2d 451 (S.D.N.Y. 2011)**

The defendants were indicted for crimes arising out of an alleged conspiracy to fix bids. The Government disclosed to defendants lists of transactions which it intended to use at trial as "overt acts." The Government produced ESI during discovery in searchable format and with searchable metadata. The defendants, citing *Brady,* moved to compel the Government to reproduce the ESI in categorized bunches that related to the transactions. The court denied the motion: "Here, there is no allegation of prosecutorial bad faith or that the Government has deliberately hid what it knowingly identified as Brady needles in the evidentiary haystacks of its disclosures to Defendants." Distinguishing *United States v. Salyer* (*q.v.*), the court observed that, among other things, the materials were electronic and searchable and the

Government had “undertaken many additional steps to relieve some of the burden of its ‘voluminous’ disclosure.”

#Discovery Materials

United States v. Saboonchi, *990 F.Supp. 2d 536 (D. Md. 2014)*

The defendant was indicted for unlawful export to an embargoed country and conspiracy. The defendant and his wife had been stopped in New York State on their return from a day trip to Canada. Electronic devices were seized and later imaged by the Government. The images were “forensically searched using specialized software” in Maryland while the devices were returned. The defendant moved to suppress, arguing that the warrantless border search and the later forensic search were unconstitutional. The court denied the motion, reasoning that, although “a forensic search of an electronic device seized at the border cannot be performed absent reasonable, articulated suspicion,” and the Government made such a showing.

The defendant moved for reconsideration after *Riley v. California* was decided. The court denied that motion by Memorandum Opinion filed July 28, 2014, because the “border search exception” to the Warrant Requirement remained viable after *Riley*.

#Fourth Amendment Warrant Required or Not

***United States v. Salyer,* 2011 WL 1466887 (E.D. Cal. Apr. 18, 2011)**

In this white-collar prosecution, where the Government collected

gigabytes of ESI and storage containers full of paper over a five-year period, the court exercised its case management powers to require the Government to identify *Brady* and *Giglio* materials. On a motion for reconsideration, the court rejected the Government's argument that identification would compel disclosure of protected work product. The court also rejected the Government's "open file" argument, as the defendant was a detained individual, had a "relatively small defense team," and did not have access to "corporate assistance" in searching the voluminous information, although the defendant did have an obligation to "help himself in ascertaining information favorable to himself." The court did, however, modify the "logistics of implementation" based on a burden argument raised by the Government.

#Discovery Materials

***United States v. Schesso,* 730 F.3d 1040 (9th Cir. 2013)**

This was an interlocutory appeal from an order suppressing evidence derived from a search of the defendant's computer equipment and digital storage devices. The defendant was charged with various federal child pornography-related crimes. The warrant had been issued by a Washington State judge based on an affidavit from a Vancouver detective and was executed at the defendant's home in Washington. In granting the relief sought, the district judge emphasized that, "the warrant application failed to include any of the protocols for searching electronic records suggesting by the concurring opinion" in *United States v. Comprehensive Drug Testing, Inc.,* 621 F.3d 1162 (9th Cir. 2010

(*en banc*). A Ninth Circuit panel reversed.

After concluding that probable cause existed for the issuance of the warrant, the court addressed whether, "the electronic data search guidelines laid out in the *CDT* cases affect the outcome here." The court distinguished the facts before it from those in *CDT* and *United States v. Tamara,* 694 F.2d 591 (9th Cir. 1982):

"Schesso's situation is unlike *CDT III* and *Tamura* in that the government properly executed the warrant, seizing only the devices covered by the warrant and for which it had shown probable cause. Based on the evidence that Schesso possessed and distributed a child pornography video on a peer-to-peer file-sharing network, law enforcement agents had probable cause to believe that Schesso was a child pornography collector and thus to search Schesso's computer system for any evidence of possession of or dealing in child pornography. In other words, Schesso's entire computer system and all his digital storage devices were suspect.

Tellingly, the search did not involve an over-seizure of data that could expose sensitive information about other individuals not implicated in any criminal activity—a key concern in both the per curiam and concurring opinions of *CDT III*—nor did it expose sensitive information about Schesso other than his possession of and dealing in child pornography. Indeed, inclusion of the search protocols recommended in the *CDT III* concurrence would have made little difference for Schesso. For example, the concurrence recommends that the government forswear reliance on the plain view doctrine, or have an independent third party segregate seizable from non-seizable data.

***. Here, officers never relied on the plain view doctrine; they had probable cause to search for child pornography, and that is precisely what they found. The seized electronic data was reviewed by Investigator Holbrook, a specialized computer expert, rather than Detective Kennedy, the case agent, and Schesso does not assert that Holbrook disclosed to Kennedy 'any information other than that which [was] the target of the warrant.' ***. Additionally, unlike the concern articulated in the concurrence in *CDT III,* which stated that the affidavit created the false impression that the data would be lost if not seized at once, here the affidavit explained that individuals who possess, distribute, or trade in child pornography 'go to great lengths to conceal and protect from discovery their collection of sexually explicit images of minors' [footnotes and citations omitted]."

The Court of Appeals did, however, offer further "guidance" on protocols:

"Although we conclude that the exercise of 'greater vigilance' did not require invoking the *CDT III* search protocols in Schesso's case, judges may consider such protocols or a variation on those protocols as appropriate in electronic searches. We also note that Rule 41 of the Federal Rules of Criminal Procedure sets forth guidance for officers seeking electronically stored information. Ultimately, the proper balance between the government's interest in law enforcement and the right of individuals to be free from unreasonable searches and seizures of electronic data must be determined on a case-by-case basis. The more scrupulous law enforcement agents and judicial officers are in applying for and issuing warrants, the less likely it is that those warrants will end up being scrutinized by the court of appeals [footnote

omitted].”

Finally, the court that, “[e]ven if the warrant were deficient, the officers’ reliance on it was objectively reasonable and the ‘good faith’ exception to the exclusionary rule applies. The Court of Appeals deferred to the state judge’s probable cause determination and the objectively reasonable reliance of law enforcement on the warrant. Further, its analysis was not affected by the decision to seek a warrant from a State, rather than a federal judge.

#Fourth Amendment Ex Ante Conditions

#Fourth Amendment Good Faith Exception

United States v. SDI Future Health Inc., 568 F.3d 684 (9th Cir. 2009)

On this appeal from an order granting a motion to suppress evidence seized pursuant to a search warrant, the Court of Appeals addressed when employees have standing to challenge searches of corporate premises: “except in the case of a small, family-run business over which an individual exercises daily management and control, an individual challenging a search of workplace areas beyond his own internal office must generally show some personal connection to the places searched and the materials seized.” The Court of Appeals remanded for further fact-finding. Turning to the corporation’s challenge to the warrant, the Court of Appeals held that the warrant had incorporated the supporting affidavit by reference, that the affidavit “accompanied” the search, and that the warrant satisfied the particularity requirement. The court did, however, sustain the invalidity of the warrant on overbreadth grounds

as to, among other things email: There was no limitation placed on the email to be searched. The court also rejected the Government's reliance on "good faith" and held that the district court should have severed the unconstitutional portions of the warrant and allowed only partial suppression.

#Fourth Amendment Particularity Requirement

***United States v. Shah,* No. 5:13-CR-328-FL (E.D.N.C. Jan. 6, 2015)**

The defendant was indicted for intentional damage to a protected computer. He moved to suppress evidence of cell phone location secured from AT&T, user location from Facebook, and email and associated data from Google. The "location" evidence was secured pursuant to 2703(d) orders and the Google evidence pursuant to a search warrant. The district court found that the defendant had no reasonable expectation of privacy in the location evidence. As to the Google-derived evidence, the court agreed with the defendant that "the warrant's terms failed to provide the necessary particularity because they failed to state the particular crime for which the evidence was being sought. Nevertheless, the evidence is admissible because officers 'acted in good faith' in relying on the *** warrant." The court also found that the "two-step" procedure described in the warrant for the search of email was constitutional and that there was no basis to impose a "minimization" procedure on the search of the Google email and data.

#Fourth Amendment Ex Ante Conditions

#Fourth Amendment Good Faith Exception

#Fourth Amendment Particularity Requirement

#Fourth Amendment Warrant Required or Not

#Social Media

***United States v. Sharp,* No. 1:14-CR-227-TCB, 2015 WL 4644348 (N.D. Ga. Aug. 4, 2015)**

The defendant moved to suppress evidence derived from the search of the mirror image of a hard drive. He consented to the search but revoked his consent after the Government had begun its review. The court denied the motion, holding that the defendant had no reasonable expectation of privacy in the mirror image once it had been obtained.

#Fourth Amendment Warrant Required or Not

***United States v. Sivilla,* 714 F.3d 1168 (9th Cir. 2015)**

The defendant was arrested after an inspection of his vehicle at a border crossing from Mexico revealed heroin inside the engine manifold. An agent took poor quality photographs of the engine area and the cocaine and preserved the latter but despite a preservation order the vehicle was sold at auction and stripped for parts. Moreover, a person to whom the defendant had loaned the vehicle shortly before had been murdered. The district court denied the defendant's motion to dismiss or for a jury instruction but allowed defense counsel to

"explore the facts regarding the failure to preserve the vehicle during trial." The jury returned a guilty verdict. The Court of Appeals held that the exculpatory value of the vehicle was not apparent and the Government had not acted in bad faith. Hence, there had been no constitutional violation. However, the district court abused its discretion when it rejected an adverse inference instruction because "the quality of the government's conduct was poor" and there was significant prejudice to the defendant. The case was remanded for a new trial with a remedial instruction to be given.

#Preservation and Spoliation

***United States v. Skilling,* 554 F.3d 529 (5th Cir. 2009), vacated in part on other grounds, *Skilling v. United States*, 130 S. Ct. 2896 (2010)**

In this appeal from a conviction for, among other things, tax fraud, the defendant argued that the Government "dumped" an enormous volume of electronic information (several hundred million pages) on him in an attempt to conceal *Brady* material. The Government had provided the defendant with an "open file [that] was electronic and searchable." It also provided a list of "hot documents," created indices, and gave the defendant access to databases. Moreover, the case was complex and there was no evidence of wrongful conduct. Under these circumstances, the court held that the use of the open file did not violate *Brady.*

#Discovery Materials

***United States v. Skinner*, 690 F.3d 772 (6th Cir. 2012)**

The defendant was convicted of drug trafficking and conspiracy. On appeal, he challenged, among other things, the denial of his motion to suppress evidence obtained from the search of his vehicle. The DEA had secured an order that authorized a telephone company to release GPS information that was used to track the defendant. The Court of Appeals affirmed. The court held that the defendant had no reasonable expectation of privacy "in the data given off by his voluntarily procured pay-as-you go cell phone." The court relied on *United States v. Knotts,* 460 U.S. 276 (1983), and distinguished the facts before it from those in *United States v. Jones* (*q.v.*): Unlike *Jones,* there was no "physical intrusion" of the defendant's vehicle and the defendant was tracked for only three days.

#Fourth Amendment Warrant Required or Not

***United States v. Sparks,* 711 F.3d 58 (1st Cir. 2013)**

The defendant was suspected of committing bank robberies. To track the defendant, the FBI placed a GPS device in his vehicle, tracked the vehicle to the scene of a bank robbery, and used the device to locate the vehicle. The defendant moved to suppress the fruits of the warrantless search, relying on *United States v. Jones.* The trial court denied the motion. Declining to address *Jones,* which was decided after the trial court had ruled, the Court of Appeals held that the good faith exception applied: "at the time of the GPS surveillance in this case, settled, binding precedent *** authorized the agents' conduct."

[Note this observation: The "good-faith exception is not a license for law enforcement to forge ahead with new investigative methods in the

face of uncertainty as to their constitutionality. 'The justifications for the good-faith exception do not extend to situations in which police officers have interpreted ambiguous precedent or relied on their own extrapolations from existing caselaw'" (citation omitted)].

#Fourth Amendment Warrant Required or Not

#Fourth Amendment Good Faith Exception

United States v. Sparks, 806 F.3d 1323 (11th Cir. 2015)

The defendants pled guilty to possession of child pornography but reserved their rights to appeal the denial of motions to suppress evidence derived from searches of their cell phone. The Eleventh Circuit affirmed:

> Defendants-Appellants['] *** day did not start well for them. They left their cell phone at a Walmart store. But this wasn't just any cell phone; Johnson and Sparks's phone stored hundreds of images and videos of child pornography that they had made using Sparks's friend's four-year-old child—and Johnson was already a registered sex offender. So Defendants must have felt pretty relieved when they learned that Linda Vo, an employee of the Walmart where Defendants left their phone, had found it and that she agreed to return it.
>
> But Vo decided to look at the contents of the phone, which were not password-protected, after speaking with Sparks and before actually meeting her. Upon discovering the images of child pornography, Vo resolved not to return the phone. Instead, unbeknownst to Defendants, she arranged for it to be turned over to law enforcement.
>
> When Vo failed to meet Sparks with the phone as the two had previously agreed, Defendants knew how to find Vo to get their phone back. But Defendants did not return to their Walmart store and look for Vo. Nor did they ask for

Walmart's assistance in obtaining their phone, found in its store, by its employee. They also did not file a report with Walmart or the police complaining that Vo would not return their phone, despite their requests. Instead, they made a conscious decision to stop pursuing the phone, even though they knew how to get it back with reasonable effort.

That decision—whether because Defendants hoped that Vo would not report them if they did not continue to seek the phone or because Defendants simply thought recovery of the phone was not worth their reasonable effort—can be viewed only as a deliberate decision to abandon the phone. Because Defendants abandoned their phone within three days of having lost it, they lack standing to challenge law enforcement's 23-day delay between recovering the phone and obtaining a search warrant to search it.

As for searches conducted within the three-day period before Defendants abandoned their interest in the phone, we find no reversible error in the district court's denials of Defendants' suppression motion. ***.

#Fourth Amendment Warrant Required or Not

United States v. Stagliano, 693 F. Supp. 2d 25 (D.D.C. 2010)

The defendants were indicted for various obscenity-related offenses arising out of the use of an "interactive computer service." They challenged the statutes under which they were indicted on constitutional grounds. Rejecting the challenges, the court held, among other things, that the use of "community standards" did not render the statutes substantially overbroad. In so doing, the court declined to follow *United States v. Kilbride.* The court also rejected that the argument that the defendants had a right to "publish" (rather than merely possess) obscene materials.

#Miscellaneous

United States v. Stanley, *753 F.3d 114 (3d Cir. 2014)*

A police investigator discovered a computer on a peer-to-peer network sharing files that he suspected contained child pornography. The investigator secured the computer's IP address as well as subscriber information. The investigator executed a search warrant on the subscriber's home but found no child pornography. The investigator surmised that "the computer sharing child pornography was connecting wirelessly to the *** [subscriber's] router from a nearly location without the ***[subscriber's] knowledge or permission." Thereafter, the investigator used a "MoocherHunter" device to trace the other computer to the interior of the defendant's home. He secured a search warrant for the home and seized a computer containing image of child pornography. The defendant was indicted and moved to suppress the evidence secured from his home, arguing that the investigator "conducted a warrantless search under *Kyllo v. United States* *** when he used the MoocherHunter to obtain information about the interior of his home that was unavailable through visual surveillance." The district court denied the motion and the defendant pled guilty. On appeal, he challenged the denial of his motion.

The Court of Appeals affirmed: "Stanley made no effort to confine his conduct to the interior of his home. In fact, his conduct—sharing child pornography with other Internet users via a stranger's Internet connection—was deliberately projected *outside* of his home, as it required interactions with persons and objects beyond the threshold of

his residence. In effect, Stanley opened his window and extended an invisible, virtual arm across the street ***. In so doing, Stanley deliberately ventured beyond the privacy protections of the home, and thus, beyond the safe harbor provided by *Kyllo."*

#Fourth Amendment Warrant Required or Not

***United States v. Stephens,* 764 F.3d 327 (4th Cir. 2014)**

In the course of an investigation, a Baltimore police officer, who had been deputized as a federal agent attached a GPS device to the defendant's vehicle and tracked him for several weeks in 2011 without a warrant. The vehicle was tracked to a particular location, the defendant was subjected to a pat-down, and the vehicle searched after a dog alerted to a weapon. *United States v. Jones* was decided while the action was pending in the district court. The defendant moved to suppress on the basis of *Jones*. The motion was denied and the defendant entered a conditional guilty plea. On appeal, he challenged the denial of his motion. The Court of Appeals affirmed. It accepted the district court's ruling that the warrantless use of the GPS was a Fourth Amendment violation. It also held that the good-faith exception to the Warrant Requirement applied given federal and Maryland case law in 2011.

The dissent objected to the majority's conclusion because, in its view, there was no binding appellate precedent in 2011, the law was unsettled, and no exigent circumstances existed.

#Fourth Amendment Good Faith Exception

***United States v. Suarez,* 2010 WL 4226524 (D.N.J. Oct. 21, 2010)**

Ruling on the defendants' motion to suppress or for an adverse inference instruction, the court found that the Government had failed to issue a litigation hold, as a result of which certain text messages between a cooperating witness and FBI agents had been deleted. The court also found that the deleted messages *could* have constituted Jencks Act material and should have been preserved. The court held that suppression of related evidence was unwarranted, as the Government had not acted in bad faith and there was no evidence that the deleted messages "clearly contained exculpatory material." The court did, however, agree to issue an adverse inference instruction and, to do so, "consult[ed] the more thoroughly developed civil case law on the subject." Applying a four-part test articulated in *Mosaid Tech. Inc. v. Samsung Elec. Co.,* 348 F. Supp. 2d 332 (D.N.J. 2004), the court found that the Government had "control" over the messages, that there was "actual suppression or withholding" of the messages, that the deleted messages were relevant, and that it was reasonably foreseeable that the messages would be discoverable. The court also relied on *Pension Comm. v. Banc of America Sec.,* 685 F.Supp.2d 456 (S.D.N.Y. 2010), in framing the instruction.

#Discovery Materials

***United States v. Swartz,* 945 F.Supp.2d 216, (D. Mass. 2013)**

The defendant in this criminal action had been indicted for allegedly attempting to download certain archived materials through a MIT computer network. He committed suicide and the charges were

dismissed. Between the indictment and the dismissal, the district court barred the defendant from disclosing documents discoverable under Criminal Rule 16 to anyone other than potential witnesses. After the suicide, media interest "escalated" and a congressional investigation commenced. Threats and harassing incidents, including hacking, occurred. The defendant's estate moved to modify the protective order pursuant to Criminal Rule 16(d) to allow it to release documents to Congress and the public. The victims of the defendant's alleged crimes intervened to oppose modification. The Government, the estate, and the victims agreed that some modification was appropriate, but disputed whether names and identifying information of certain individuals, including law enforcement personnel, should be disclosed.

The district court held that, (1) it was "appropriate to analyze the 'good cause' requirement to [modify a protective order] under the criminal rules in light of precedent analyzing protective orders in civil cases," (2) the interests of the third-party victims bore "particular emphasis," and (3) the presumptive right of access did not attach to criminal discovery materials. Applying the "good cause" test, the district court found that, "the estate's interest in disclosing the identity of individuals named in the production, as it relates to enhancing the public's understanding of the investigation and prosecution ***, is substantially outweighed by the interest of the government and the victims in shielding their employees from potential retaliation." The district court also allowed MIT to redact information related to weaknesses in its computer network and modified the order so that the estate could "disclose discovery materials in its possession after redaction of the identity of

individuals and sensitive network information."

#Trial Related

United States v. Szymuszkiewicz, 622 F.3d 701 (7th Cir. 2010)

The defendant had modified a "rule" on his supervisor's email account so that copies of email sent to her were automatically sent to the defendant. On an appeal from his conviction under the Wiretap Act, the Court of Appeals affirmed. First, the Court of Appeals rejected the defendant's argument that he should have been charged under the SCA: "It is risky to defend against one crime by admitting another." The Court of Appeals then discussed the concept of "package switching" (by which email is routed from sender to recipient) and concluded that there had been an "interception" under the Wiretap Act. The Court of Appeals also held that the interception in issue was contemporaneous with the email, but rejected the incorporation of a "contemporaneous" requirement into the Wiretap Act that had been adopted by other Courts of Appeals.

#Miscellaneous

United States v. Thielemann, 575 F.3d 265 (3d Cir. 2009)

The Court of Appeals affirmed the imposition of special conditions on a convicted child pornographer. The conditions banned the defendant from possessing or viewing adult sexually explicit material and also restricted him from owning or operating a personal computer with

Internet access anywhere without permission.

#Miscellaneous

***United States v. Thomas*, 2013 WL 6000484 (D. Vt. Nov. 8, 2013)**

The defendants were charged with possession of child pornography. They moved to suppress all evidence derived from searches of their residences, arguing that the search warrant applications contained inaccuracies and omitted facts and that the warrants were derived from warrantless automated searches of private information. After an evidentiary hearing, the district court denied the motions, finding that the defendants had no reasonable expectation of privacy in files shared on peer-to-peer sites:

"The affidavits state that a law enforcement officer performed an investigation of peer-to-peer file sharing using automated software to determine whether IP addresses in his or her jurisdiction had offered to share files indicative of child pornography. Defendants argue that the software actually has the ability to access private information which Defendants did not make available for sharing. After a lengthy evidentiary hearing, there is no factual support for this claim. Instead, the evidence overwhelming demonstrates that the only information accessed was made publicly available by the IP address or the software it was using. Accordingly, either intentionally or inadvertently, through the use of peer-to-peer file sharing software, Defendants exposed to the public the information they now claim was private."

The court undertook an analysis under *Franks v. Delaware,* 438 U.S. 154

(1978), directed to technology-related statements included in (or omitted from) the search warrant applications and found that, as to a few statements that required further analysis, (1) "there is ample evidence of subjective and objective good faith and reasonableness" and, (2) even discounting any erroneous information or correcting material omissions, there was ample evidence to support the existence of probable cause. The court also found that, in any event, the good cause exception to the exclusionary rule would apply.

#Fourth Amendment Warrant Required or Not

#Fourth Amendment Good Faith Exception

***United States v. Thomas,* 788 F.3d 345 (2d Cir. 2015)**

Law enforcement personnel were investigating possible child pornography committed through peer-to-peer file-sharing software. To do so officers automated the process of canvassing the peer-to-peer networks and officers were trained on the process. The defendant was located through the process. The affidavit submitted in support of a warrant described the process only in general terms. The defendant was indicted for production of child pornography and, after his motions to suppress were denied, entered a conditional plea. "The question presented is whether a search warrant affidavit that relied upon evidence generated by an automated software program provided a substantial basis for a magistrate judge's conclusion that there was probable cause that child pornography would be found on the defendant's computer." The Court of Appeals affirmed. The affidavit sufficiently described the software and found no error in the district

court's finding that the software was reliable. The Court of Appeals also rejected the argument that law enforcement must secure a second warrant to search a specific computer within an otherwise searchable area.

#Fourth Amendment Warrant Required or Not

***United States v. Thomas*, No. 3:15CR80, 2015 WL 5999313 (E.D. Va. Oct. 13, 2015)**

The defendant was indicted for conspiracy to conduct robberies in violation of the Hobbs Act. Evidence against him included CSLI obtained over a 133-day period pursuant to a Section 2703(d) order. The defendant moved to suppress, arguing that the order violated his Fourth Amendment rights. The court was bound by *United States v. Graham,* 796 F.3d 332 (4th Cir. 2015), which held that long-term collection of CSLI was unreasonable under the Fourth Amendment, However, the court did not determine whether the collection at issue was unreasonable because the good faith exception to the Warrant Requirement applied: The officers relied on a statute which, at the time, "had not been found, in binding appellate precedent," to be unconstitutional. They also relied on an order that was not facially deficient and had been issued by a "neutral and detached" magistrate judge.

#Fourth Amendment Good Faith Exception

#Fourth Amendment Warrant Required or Not

United States v. Valle, 807 F.3d 508 (2d Cir. 2015)

The defendant, a NYPD officer, was convicted of violating the Computer Fraud and Abuse Act. He used his access to NYPD databases for addresses and other personal information for his violent sexual fantasies. On appeal, the defendant's conviction was reversed because he had authorized access rights to the databases and the statutory phrase, "exceeding authorized access," was inapplicable to him.

#Miscellaneous

NOTE: THIS DECISION WIDENS CIRCUIT SPLIT ON INTERPRETATION OF "EXCEEDING AUTHORIZED ACCESS" IN COMPUTER FRAUD AND ABUSE ACT.

United States v. Vaughn, No. CR 14-23 (JLL), 2015 WL 6948577 (D.N.J. Nov. 10, 2015)

The defendant moved to dismiss the Indictment because the Government failed to certain preserve text messages. The Government conceded that it had a duty to preserve and failed to do so but contested the remedy. The court declined to dismiss the indictment but precluded the Government from using *any* text messages in its case: "Precluding only the text messages between law enforcement and the CW ***, provides an inadequate incentive for the Government to exercise appropriate diligence in the future, both in complying with preservation polices [*sic*] and in making representations to the Court and following its orders (footnote omitted)." The court also reserved to trial whether it would give an adverse inference instruction.

#Preservation and Spoliation

#Trial-Related

***United States v. Voneida*, 337 Fed. App'x. 246 (3d Cir. 2009)**

The defendant was convicted of transmitting a threatening communication in interstate commerce after posting statements on his Myspace page. In affirming the conviction, the Court of Appeals rejected the defendant's argument that the statements had not been transmitted "because his postings were more like a hand-written diary." The court also rejected the argument that his postings were protected speech and that the prosecutor's reference to the Virginia Tech shootings (which happened several days before the postings) was *unduly* prejudicial.

#Trial Related

***United States v. Vosburgh,* 602 F.3d 512 (3d Cir. 2010)**

This was an appeal from a conviction for possession of child pornography. At its center was an "underground Internet message board." The board did not host child pornography but, instead, directed users to where child pornography could be found on the Internet. Access to the board was relatively difficult: "It is highly unlikely that an innocent user of the Internet would stumble across … [the site] through an unfortunate Google search." During a sting operation for users of the board, law enforcement came across an IP address that was traced to an ISP. In response to a subpoena, the ISP identified the defendant. When agents attempted to execute a search warrant at the defendant's residence, he destroyed various electronic media. Thereafter, agents

secured a second warrant for a hard drive that they had inadvertently failed to seize the first time. "Thumbnail" images on the hard drive were introduced at trial. These images could not be accessed by the defendant. However, the Government argued that the thumbnails demonstrated that the defendant had possessed full-sized child pornographic images at some point. The Court of Appeals held that, given the unique nature of IP addresses, there was a fair probability that evidence of criminal activity would be found in the residence. The court also held that the application was not "stale," although there was a four month gap between the application and attempts to access the site, observing that computers have long memories and that those interested in child pornography "tend to hoard their materials and retain them for a long time." The court also held that the Government's reliance on the thumbnail images did not constitute an impermissible amendment of the indictment and that there was sufficient evidence to support the conviction (the defendant argued on appeal that his expert had "definitively disproved" the Government's case).

#Miscellaneous

United States v. Warshak, 631 F.3d 266 (6th Cir. 2010)

In this appeal from convictions arising out of a "massive scheme to defraud," the Court of Appeals held that a defendant had a reasonable expectation of privacy in the content of email held by an commercial Internet Service Provider (drawing an analogy to post offices and telephone companies) and that the Government violated the defendant's Fourth Amendment rights when it secured the email from

the ISP by subpoena under Section 2703(b) and *ex parte* order under Section 2703(d) of the SCA. However, the Court of Appeals concluded that an exclusionary remedy was inappropriate as the securing agents had relied in good faith on the constitutionality of the Act. The Court of Appeals observed, however, that "after today's decision, the good-faith calculus has changed, and a reasonable officer may no longer assume that the Constitution permits warrantless searches of private emails." The Government had failed to give the defendant notice of the subpoena or order, as required by Section 2703(b)(1)(B). However, the Court of Appeals rejected the defendant's argument that this weighed against good faith, as the issue was reasonable reliance in *obtaining* the email. Likewise, the Court of Appeals rejected the defendant's argument that the Government's demand pursuant to Section 2703(f) that the ISP preserve his email *prospectively* violated the Act (although this was a subject of the concurrence). The Court of Appeals held, among other things, that the Government had acted properly in making large amounts of ESI available to the defendant. Rejecting the analogy to the Federal Rules of Civil Procedure made in *United States v. O'Keefe,* the Court of Appeals held that the Criminal Rules did not require the Government to produce ESI in a particular form, that much of the ESI was taken from computers that the defendants could access, that the defendants had an expert who could search the ESI, and the Government had given the defendants a "guide" to the ESI. The Court of Appeals also held that the Government had no obligation to "sift fastidiously" through the ESI to satisfy the Government's *Brady* obligations. Reviewing the counts on which the defendants were convicted, the Court of Appeals held, among other things, that there was sufficient evidence to conclude that a defendant had committed

access-device fraud when he charged monies to customers' credit card accounts without consent. Although access to the monies in the accounts may have been "ephemeral" (the monies were credited back immediately), the defendant did "receive" the monies and that was sufficient for conviction. The Court of Appeals did reverse the convictions under several counts and remanded for resentencing on others.

#Fourth Amendment Warrant Required or Not

#Fourth Amendment Good Faith Exception

***United States v. Weaver,* 636 F. Supp. 2d 769 (C.D. Ill. 2009)**

The Government moved to compel an ISP to comply with a subpoena and produce the contents of email sent or received by the defendant, accused of child pornography. Interpreting the SCA, the court held that, for email less than 181 days old, an ISP must comply with a subpoena if email is "held or maintained solely to provide the customer storage of computer processing services." Disagreeing with a Ninth Circuit decision, and relying on a distinction between Web-bases and other email systems," the court also held Web-based email that is *opened* and then stored is not "in storage" under the Act. Under the facts *sub judice*, the court granted the motion.

#Discovery Materials

***United States v. Welch,* 291 Fed. Appx. 193 (10th Cir. 2008)**

The defendant, convicted on child pornography charges, appealed the denial of motions to suppress evidence. The Government had begun drug investigations, which had "stalled" twice. In the interim, the Government learned that the defendant had operated a child pornography Website. The Government then secured a search warrant for rental premises owned by the defendant, located boxes containing drug-manufacturing materials, and made a warrantless arrest of the defendant. The Government then secured a search warrant for the defendant's residence to search for evidence of drug manufacturing. During execution of the warrant, the Government seized *non-networked* computer equipment. During a search of the electronic information on the seized items, the Government discovered child pornography on the unallocated space on a hard drive. The Government then secured a warrant to search for child pornography. The Court of Appeals held that there was no probable cause to believe that there was evidence of a drug crime at the rental premises, because, among other things, the supporting information was "stale." However, since all the known facts could have led to a reasonable belief that the evidence might be present and there was no police misconduct, the court applied the "good faith" exception. The court then rejected the defendant's argument that the second search warrant was overbroad: The warrant allowed computers to be searched for evidence of drug manufacturing, the Government could not identify what types of computer equipment it would encounter during the search, and the Government halted the search and applied for another warrant when it found child pornography. The court also rejected a

"fruit of the poisonous tree argument."

#Fourth Amendment Particularity Requirement

***United States v. Wigginton,* 2015 WL 8492457 (E.D. Ky. Dec. 10, 2015)**

The defendant was charged with bank robbery. His debit card transactions (which placed him in the vicinity of two robberies) had been tracked over thirteen days and his real-time CSLI (used to locate and arrest him) for less than 24 hours. He moved to suppress evidence derived from this tracking. The defendant attempted to distinguish *Smith v. Maryland* because it "concerned hard copies of checks, deposit slips, and the like, none of which were able to convey the defendant's real-time location." The court rejected the attempt. The court also distinguished *United States v. Jones* because there was no physical trespass and the duration of the tracking was short-term.

#Fourth Amendment Warrant Required or Not

***United States v. Williams,* 592 F.3d 511 (4th Cir. 2010)**

The defendant was tried on stipulated facts and found guilty of possession of an unregistered machine gun, an unregistered silence, and child pornography. He appealed from the denial of his motion to suppress evidence. The State of Virginia had secured a warrant to search for and seize evidence of threats to bodily harm and harassment by computer. During execution of the search on various media, child pornography was found. The Court of Appeals rejected the defendant's

argument that the scope of the warrant was exceeded: Evidence of child pornography was relevant to the offenses for which the warrant had been issued. Moreover, evidence of child pornography fell within the plain view doctrine as the warrant authorized the *search* of the media and the subsequent *seizure* of the contraband. The court also upheld the search of a lockbox containing the machine gum and the silencer, noting that the officers were entitled to inspect these items during their search for media that could have been inside the box.

#Fourth Amendment Particularity Requirement

***United States v. Winn,* 79 F.Supp.3d 904 (S.D. Ill. 2015)**

The defendant used his cell phone to record teenage girls at a pool and he rubbed his genitals while doing so. Local police undertook an investigation, seized the defendant's phone with his consent, and conducted interviews. Nine days later, a detective used a template to prepare an affidavit for a warrant to search the phone. However, the warrant mistakenly identified the crime being investigated as disorderly conduct. Data was extracted from the phone that did not contain images of the girls at the pool but did contain images of child pornography. The defendant was charged with State offenses. A detective then preformed a manual search of the phone for other images of girls at the pool. The prosecution was referred to the United States Attorney and the defendant indicted on child-pornography related offenses. The defendant moved to suppress. The district court concluded: (1) The nine-day delay was "avoidable but not unreasonable;" (2) the mistaken listing of the relevant offense did not

violate the Fourth Amendment as there was probable cause to search for evidence of that offense; (3) the warrant was overbroad and lacked particularity because it authorized the seizure of "any and all files" and because no time frame was specified. The district court declined to apply the good faith exception because of the general nature of the warrant and suppressed all evidence from the phone.

#Fourth Amendment Good Faith Exception

#Fourth Amendment Particularity Requirement

Fourth Amendment Warrant Required or Not

***United States v. Woerner,* 709 F.3d 527 (5th Cir. 2013)**

In this appeal from a conviction for possession of child pornography, the defendant challenged the denial of his motion to suppress evidence derived from an illegal search and seizure. A police officer in Illinois had been "patrolling" an Internet peer-to-peer sharing network. He located a possible suspect based on the suspect's online profile, secured access to files containing child pornography, located a physical address in Texas, and gave the information to law enforcement in Texas, which secured a warrant for the address. Although they were aware that the warrant had expired, local officers executed it, found incriminating evidence, and arrested the defendant.

During the same time period, the FBI independently secured similar information, secured a federal search warrant, and searched the address after the local police advised of the search and the arrest. Incriminating evidence was found. While the defendant was in local

custody, the FBI "mirandized" the defendant and interviewed him. He made incriminating statements which led the FBI to a minor with whom the defendant had a sexual relationship. An interview with the minor led to the issuance of a second federal search warrant for the address. More incriminating evidence was seized. Then, based on statements by the defendant and others that the defendant used various email addresses to access child pornography, a third federal search warrant was issued to third-party Internet providers. The application for this third warrant included statements made by the defendant during the FBI interview. That warrant led to the discovery of multiple images and video of child pornography.

The defendant moved to suppress everything as being the tainted "fruit" of the evidence seized during the execution of the expired local warrant. The trial court granted the motion in part and suppressed the evidence derived from the statements made to the FBI as well as the evidence seized from the first federal warrant search. The motion was denied as to statements made by the minor and his family and evidence secured through the other warrants. The trial court relied on the good faith exception to the exclusionary rule in denying the motion in part.

The Court of Appeals affirmed: (1) "The evidence at issue was obtained pursuant to a search warrant, so we begin by evaluating whether the good faith exception to the exclusionary rule applies," (2) After describing four situations where the good faith exception would not apply, the court observed that, "this case calls upon us to answer whether the good faith exception applies in a fifth situation: when the magistrate's probable cause finding is based on evidence that was the product of an illegal search or seizure," (3) inclusion of the defendant's

suppressed statements in the application for the third warrant were, "the result of negligence of more or more law enforcement officers," (4) the affiant for the third federal search warrant could not have known the statements would later be suppressed, and (5) "[u]nder these facts, involving state and federal investigations that were parallels, suppression is not justified."

#Fourth Amendment Good Faith Exception

***United States v. Wurie,* 728 F.3d 1 (1st Cir. 2013)**

"This case requires us to decide whether the police, while seizing a cell phone from an individual's person as part of his lawful arrest, can search the phone's data without a warrant. We conclude that such a search exceeds the boundaries of the Fourth Amendment search-incident-to-arrest exception. Because the government has not argued that the search here was justified by exigent circumstances or any other exception to the warrant requirement ***," the denial of the defendant's motion to suppress was reversed, the conviction vacated, and the matter remanded.

#Fourth Amendment Warrant Required or Not

***In re Warrant for All Content & Other Info. Associated with the Email Account xxxxxxx@gmail.com Maintained at Premises Controlled By Google, Inc.,* 33 F. Supp. 3d 386 (S.D.N.Y. 2014)**

The court granted a search warrant application for information from a Gmail account as it was presented by the Government. In this opinion, the court explained why it issued the warrant and did not impose conditions. That explanation included the following:

(1) The SCA permits the Government to obtain the "contents" of an "electronic communication" pursuant to a search warrant.

(2) "In the case of electronic evidence, which typically consists of enormous amounts of undifferentiated information and documents, courts have recognized that a search for documents or files responsive to a warrant cannot possibly be accomplished during an on-site search."

(3) *Fed. R. Crim. P.* 41(e)(2)(B) was amended in 2009 to provide a two-step procedure for seizure, followed by review, of electronically stored information.

(4) Caselaw "supports the Government's ability to access an entire email account in order to conduct a search for emails within the limited categories contained in the warrant."

(5)"It is unrealistic to believe that Google *** could be expected to produce the materials responsible to categories**" because (a) "the burden on Google would be enormous because duplicating the Government's efforts might require it to examine every email," (b)

"Google employees would not be able to interpret the significance of particular emails without having been trained in the investigation" and (c) "[p]lacing the responsibility for performing these searches on the email host would also put the host's employees in the position of appearing to act as agents of the Government vis-a-vis their customers."

(6) "Judging the reasonableness of the execution of a warrant *ex ante* *** is not required by Supreme Court precedent."

(7) "If the Government acts improperly in its retention of the materials, our judicial system provides remedies, including suppression and an action for damages ***."

#Fourth Amendment Ex Ante Conditions

***In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, 15 F. Supp. 3d 466 (S.D.N.Y. 2014)**

A magistrate judge issued a warrant *under the SCA* that authorized the Government to search and seize information in a web-based e-mail account. "Microsoft complied with the search warrant to the extent of producing non-content information stored on servers in the United States. However, after it determined that the target account was hosted in Dublin [Ireland] and the content information stored there," Microsoft moved to quash as to the information stored abroad. Microsoft argued that United States courts cannot issue warrants for "extraterritorial search and seizure." The court disagreed:

(1) Although the language of the controlling statute, the SCA, is "ambiguous in at least one critical respect," the "unique structure of the SCA does not implicate principles of extraterritoriality." (The ambiguity arose from the reference in 18 U.S.C. Section 2703(a) to the Federal Rules of Criminal Procedure, which includes limitations on the territorial reach of warrants issued pursuant to Rule 41).

(2) "It has long been the law that a subpoena requires the recipient to produce information in its possession, custody, or control regardless of the location of that information."

(3) "In this case, no such exposure [to possible human observation] takes place until the information is reviewed in the United States, and consequently no extraterritorial search has occurred."

The court observed that to hold otherwise would raise practical concerns:

(1) "[A] party intending to engage in criminal activity could evade an SCA Warrant by the simple expedient of giving false residence information, thereby causing the ISP [internet service provider] to assign his account to a server outside the United States."

(2) "[I]f an SCA Warrant were treated like a conventional warrant, it could only be executed abroad pursuant to a Mutual Legal Assistance Treaty ('MLAT')." (3) "[A]s burdensome and uncertain as the MLAT process is, it is entirely unavailable where no treaty is in place."

Finally, the court rejected Microsoft's argument that the warrant had extraterritorial application: "an SCA warrant does not criminalize

conduct taking place in a foreign country; it does not involve the deployment of American law enforcement personnel abroad; it does not require even the physical presence of service provider employees at the location where data are stored. At least in this instance, it places obligations only on the service provider to act within the United States."

On July 31, 2014, the magistrate judge was affirmed from the Bench by a district judge. On August 29, 2014, the district judge lifted the stay of execution she had granted on July 31st to allow Microsoft an opportunity to appeal. The district judge concluded that her order was no final and appealable.

#Miscellaneous

***In re Warrant to Search a Target Computer at Premises Unknown*, 958 F.Supp.2d 753 (S.D. Tex. 2013)**

"The Government has applied for a Rule 41 search and seizure warrant targeting a computer allegedly used to violate *** [federal] laws. Unknown persons are said to have committed these crimes using a particular email account via an unknown computer at an unknown location. The search would be accomplished by surreptitiously installing software designed not only to extract certain stored electronic records but also to generate user photographs and location information over a 30 day period. In other words, the Government seeks a warrant to hack a computer suspected of criminal use."

The magistrate judge denied the application: (1) The application did not

meet any of the territorial limits imposed by Criminal Rule 41(b); (2) the application did not meet the particularity requirement of the Fourth Amendment; (3) concluding "video surveillance" was being requested and borrowing from standards set forth for wiretaps under Title III of the Omnibus Crime Control and Safe Streets Acts of 1968, the application failed to address alternative investigative methods or the steps that would be taken to minimize the surveillance.

[Note that magistrate judge's statement, among other things, that "the extremely intrusive nature of such a search requires careful adherence to the strictures of Rule 41 as currently written, not to mention the binding Fourth Amendment precedent for video surveillance in this circuit"].

#Fourth Amendment Particularity Requirement

***Yates v. United States,* 135 S.Ct. 1074 (2015)**

The petitioner, a commercial fisherman, ordered a crew member to toss undersized fish overboard to prevent federal authorities from confirming the catch. He was prosecuted and convicted for destruction of a "tangible object" under 18 U.S.C. Sec. 1519. Interpreting the statute, which was enacted as part of the Sarbanes-Oxley Act, the court reversed:

"A fish is no doubt an object that is tangible ***. But it would cut *** 1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent. Mindful that in Sarbanes-Oxley, Congress trained its attention on corporate and accounting deception and cover-ups, we conclude that a matching description of

*** 1519 is in order: A tangible object captured by *** 1519 *** must be one used to record or preserve information."

#Miscellaneous

DECISIONS – STATE

In re 381 Search Warrants Directed to Facebook, Inc., 132 A.D.3d 11, 14 N.Y.S.3d 23 (N.Y. App. Div. 2015)

A motion court denied Facebook's motion to quash subpoenas for various accounts issued in furtherance of a large-scale investigation into fraudulent Social Security claims. "This appeal raise the question of whether an online social networking service, the ubiquitous Facebook, served with a warrant for customer accounts, can litigate prior to enforcement the constitutionality of the warrant on its customers' behalf." The Appellate Division dismissed the appeal:

The key role of the judicial officer in issuing a search warrant is described generally by the Fourth Amendment and more specifically by state statutes. None of these sources refer to an inherent authority for a defendant or anyone else to challenge an allegedly defective warrant before it is executed.

#Miscellaneous

#Social Media

In re Alex C., 161 N.H. 231, 13 A.3d 347 (2010)

There was an appeal from a trial court ruling that a delinquency

petition was “true.” The juvenile had sent twenty admittedly harassing instant messages to the mother of a girl who had run away. On appeal, the delinquent argued these were not “repeated communications” under New Hampshire law. The Supreme Court affirmed. The Court viewed IM, “not necessarily as some monolithic entity-a single conversation, but as a series of discrete electronic messages between two or more individuals.”

#Trial Related

In re Appeal of Application for Search Warrant, 2012 VT 102 (2012)

In this complaint for extraordinary relief, the Vermont Supreme Court addressed whether a judicial officer had discretion to attach “ex ante or prospective conditions” to a search warrant. In the course of an identity theft investigation, law enforcement applied for a warrant to search premises and seize electronic media. The warrant was issued. However, in a separate order, the issuing judicial officer imposed conditions on the search and use of the content of any seized media. After concluding that it had jurisdiction, the Supreme Court held: (1) warrant instructions are binding and failure to follow those instructions renders a search unconstitutional; (2) “ex ante instructions are sometimes acceptable mechanisms for ensuring the particularity of a search;” (3) the issuing court did not have authority to “pick and choose which legal doctrines would apply to a particular police search” (thus invalidating a condition related to the plain use doctrine); (4) “separation and screening instructions” were an appropriate means to ensure that police could only view information for which probable cause existed; (5)

limitations on search techniques and the prohibition of use of "sophisticated searching software" without prior judicial approval was appropriate; and (6) instructions with regard to copying, return, and destruction were within the judge's discretion. It should be noted that the issuing officer relied on *United States v. Comprehensive Drug Testing, Inc.,* 579 F.3d 989 (9th Cir. 2009) (*en banc*) (*"CDT I*") , which approved the imposition of conditions to a warrant. The imposition of conditions was later subsequently disapproved in *United States v. Comprehensive Drug Testing, Inc.,* 621 F.3d 1162 (9th Cir. 2010) ("super" *en banc*) ("*CDT II"*). It should also be noted that, throughout its decision, the Vermont Supreme Court emphasizes both volume of ESI and privacy concerns.

#Fourth Amendment Ex Ante Conditions

***Apple, Inc. v. Superior Court*, 56 Cal.4th 128 (2013)**

In this putative class action, the California Supreme Court interpreted the Song-Beverly Credit Card Act to be inapplicable to transactions which involved the alleged collection of personal identifiers as a condition of the use of credit cards to purchase electronically downloadable products over the Internet. The court distinguished *Pineda v. Williams-Sonoma Stores, Inc.*, (*q.v.*) which also interpreted the Act, as being limited to "the purchase of a physical product at a traditional 'brick-and-mortar' business." The court did note, however, that the Legislature was free to amend the Act to reach the electronic transactions.

#Miscellaneous

***Bainbridge Island Police Guild v. City of Puyallup*, 172 Wash. 2d 398 (2011)**

Various citizens filed suit in various counties seeking disclosure of a criminal investigation report and an internal investigation report regarding allegations of sexual assault against a police officer. The police officer and the police union sought to enjoin disclosure, citing the state public records statute. The lower courts ruled that that the reports were statutorily exempt from disclosure as personal information. The citizens seeking the reports appealed. Upon consolidating appeals, the Washington Supreme Court reversed and remanded, instructing the state to redact the officer's identity and produce the remainder of the reports. Despite the fact that the officer failed to prevent the production of the reports to newspaper reporter, the court stated that it did not mean he was forever prohibited from protecting his right to privacy in regards to disclosure of the reports to other individuals. While the officer's name was deemed statutorily exempt from disclosure, the remainder of the investigation reports concerning the allegation was not exempt. The Court held that the public did not have a legitimate interest in the name of a police officer subject to an unsubstantiated allegation of sexual misconduct; the public did, however, have a legitimate interest in knowing how police departments responded to and investigated such allegations.

#Miscellaneous

***Bennett v. Smith Bundy Berman Britton*, PS, 176 Wash.2d 303 (2013) *(en banc*)**

In what began as a marriage dissolution action, an accounting was sued and, during discovery, produced tax records of nonparties. The parties stipulated to a confidentiality order that provided, among other things, that the tax records could be used in motions, etc., only if filed under seal. The firm moved for summary judgment and the trial court ordered that documents be filed under seal. After opposition papers were filed, but before the court had considered the motion, the action settled. After the settlement, the parties realized that the opposition papers inadvertently included materials that should have been filed under seal and agreed to file redacted and sealed versions of those papers. The plaintiffs' expert then moved to intervene, seeking access to everything filed under seal. The trial court allowed the intervention but denied to unseal the documents. The intermediate appellate court affirmed, as did the Washington Supreme Court. Interpreting the Washington State Constitution, he Supreme Court held that "the act of filing a document does not alone transform it into a public one" and that "information does not become part of the judicial process is not governed by the open courts provision." Here, the sealed documents were not relevant to a decision and there was no presumption of public access. Instead, a five-part balancing test would govern. The Supreme Court remanded to apply that test.

#Discovery Materials

***Butler v. State,* 459 S.W.3d 595 (Tex. Crim. App. 2015)**

The defendant was convicted of the aggravated kidnapping of his girlfriend. On appeal, he challenged the authentication of incriminating text messages through the girlfriend. The Court of Criminal Appeals affirmed:

"Although *** Salas's [the girlfriend's] responses are not without ambiguity, a rational jury could conclude that Salas recognized the texts to be coming from the Appellant on this occasion (and not someone else who might have purloined his phone) because: (1) he had called her from that number on past occasions; (2) the content and context of the text messages convinced her that the messages were from him; and (3) he actually called her from that same phone number during the course of that very text message exchange."

#Trial Materials

***Clark v. State,* No. 0953 (Md. Ct. Sp. App. Dec. 3, 2009)**

After conviction, the defendant appealed from the denial of his motion for a mistrial based on juror misconduct. One juror had conducted Wikipedia research on a relevant and significant term. He had not, however, shared the results of the research with fellow jurors. The appellate court reversed, citing *Wardlaw* (see below) and concluding that the juror had done more than look up a definition: "The definition of 'a definition' is like a rubber band and can, as here, be stretched to the breaking point." By doing so, the impartiality of the entire panel had been compromised.

#Trial Related

Collins v. State, **No. 2013-CT-00761-SCT, 2015 WL 4965886 (Miss. Aug. 20, 2015)**

The defendant had been convicted of murder. The evidence against him included GPS locations based on the defendant's cell phone records. Addressing a question of first impression, the Mississippi Supreme Court distinguished between lay testimony that "simply describes the information in a cell phone record *** [or] merely informs the jury as to the location of cell towers" from testimony that "goes beyond the simple description of cell phone basics *** [and] purports to pinpoint the general area in which the cell phone user was located based on historical cellular data." The court held that the latter requires that a witness be qualified as an expert. The conviction was reversed in part because the testifying officer had not been qualified.

#Miscellaneous

#Trial Materials

Commonwealth v. Augustine, **467 Mass. 230, 4 N.E.3d 846 (2014)**

In the course of a murder investigation, the Commonwealth secured an order pursuant to Section 2703(d) of the SCA that gave it access to the historical CSLI of a suspect for a 14-day period. A motion judge suppressed evidence derived from the CSLI. The judge reasoned that, notwithstanding the issuance of the order, access to CSLI constituted a "search" under the Massachusetts Constitution that required a search warrant supported by probable cause.

The Supreme Judicial Court affirmed. It held that the user of a cellular telephone had a reasonable expectation of privacy in historical CSLI and rejected the application of the third-party doctrine: "We agree with the defendant *** that the nature of cellular telephone technology and CSLI and the character of cellular telephone use in our current society render the third-party doctrine of [*United States v.*] *Miller* and *Smith* [*v. Maryland*] inapposite; the digital age has altered dramatically the societal landscape from the 1970s, when *Miller* and *Smith* were written."

The Court noted that, "it is likely that the duration of the period for which historical CSLI is sought will be a relevant consideration in the reasonable expectation of privacy calculus *** [b]ut there is no need to consider at this juncture what the boundaries of such a time period might be because *** the two weeks covered by the 2703(d) order at issue exceeds it *** the tracking of the defendant's movements *** for two weeks was more than sufficient to intrude upon the defendant's reasonable expectation of privacy ***."

The Court remanded for consideration of whether the affidavit submitted in support of the order demonstrated the existence of probable cause. The Court also declared that its ruling constituted a "new rule" and would apply only to cases in which a defendant's conviction was not final.

#Fourth Amendment Warrant Required or Not

Commonwealth v. Cox, **2013 Pa. Super. 221 (2013)**

"In this appeal, we face the question of whether comments made in an on-line forum can constitute a criminal offense." The appellant had appealed a conviction for harassment under Pennsylvania law after she posted lewd comments on Facebook. The court affirmed: "The evidence of record establishes that Cox posted a statement indicating that Victim suffered from a sexually transmitted disease on an online forum, and that this statement was viewed by multiple people. *** this is sufficient to support a finding that Cox communicated lewd sentiments about Victim to other people, and an inference that in doing do it was here intent to harass, annoy or alarm Victim" (footnotes omitted).

#Trial Related

#Social Media

Commonwealth v. Denison, **No. BRCR2012-0029 (Mass. Super. Ct. Oct. 7, 2015)**

"ShotSpotter is a listening and recording system that runs 24/7, attuned to the sound of gunfire. When the system hears gunfire, or what it recognizes as gunfire, it locates it, reports it, preserves the recording, and send the recording to the customer within seconds." The defendant, charged with first degree murder, moved to suppress a recording made by ShotSpotter of an verbal exchange among numerous individuals before and after the fatal gunshots. The court rejected that the argument that the defendant had a reasonable expectation of

privacy under the Massachusetts Declaration of Rights because the exchange was "audible by anyone passing and was in fact heard by a crowd of neighbors and other witnesses." However, the court found that the exchange was an "oral communication" and that the recording was a prohibited "interception" under the Massachusetts Wiretap Act because the defendant had no knowledge that the exchange was being recorded. The court also found that the interception was "willful" because the police had "purposefully directed the placement of the sensors." The court granted the motion to suppress: "the continuous secret audio surveillance of selective urban neighborhoods *** is the type of surreptitious eavesdropping as an investigative tool that the Legislature sought to prohibit."

#Fourth Amendment Warrant Required or Not

#Miscellaneous

***Commonwealth v. Dyette,* 87 Mass.App.Ct. 548 (2015)**

The defendant was convicted of firearms offenses. At the time of his arrest, an officer "took the defendant's cell phone, looked at the call log, and saw that there was an array of numbers and symbols that did not represent a telephone number." The log was also examined later when the defendant was booked. The content of the log incriminated him and was admitted into evidence. On appeal, the defendant argued, among other things, that this evidence should have been suppressed. The Appeals Court agreed and reversed the conviction: Relying on *Riley v. California,* the court observed that "[t]here was no effort to secure the telephone in any fashion or to seek a warrant and that the risk that

records of calls "would be pushed out of the call log in the event of other incoming calls" could be avoided by "turning the cell phone off, placing the cell in a Faraday bag, or securing the phone and seeking a warrant for it." The court also held that "the possible degradation of the call log is not an exigent circumstance since that degradation is preventable."

#Fourth Amendment Warrant Required or Not

#Fourth Amendment Exigent Circumstances

Commonwealth v. Estabrook, 472 Mass. 852, 38 N.E.3d 231 (2015)

The defendants in this murder prosecution moved to suppress evidence derived from historical CSLI. In 2012, police secured two weeks of CSLI for one defendant's cell phone pursuant to a Section 2703(d) order. That evidence placed his cell phone near the scene of the murder and, through an interview with him, led the police to the second defendant. The CSLI was reobtained pursuant to a search warrant supported by probable cause over a year later. The trial court denied the motions. Revisiting *Commonwealth v. Augustine,* the Massachusetts Supreme Judicial Court adopted a "bright-line rule that a request for historical CSLI for a period covering six hours or less does not require a search warrant." The court emphasized that "the salient consideration is the length of time for which a person's CSLI is requested, not the time covered by the person's CSLI that the Commonwealth ultimately seeks to use as evidence at trial." Thus, the Massachusetts warrant requirement applied because the police obtained two weeks of CSLI.

Both defendants incriminated themselves during interviews conducted after the CSLI had been obtained. The court observed that the statements would be admissible "if they are not the fruits of the illegal search of the CSLI." The court concluded that none of the statements made by the second defendant should be suppressed because "they were sufficiently attenuated from the illegal search." However, the statements of the defendant with the cell phone were suppressed as these were made in "in close proximity to the illegality, and there were no intervening circumstances between the police questions based on the CSLI" and the defendant's responses.

Finally, the court upheld the 2013 warrant. The supporting affidavit established probable cause and contained no information obtained pursuant to the Section 2703(d) order.

#Fourth Amendment Warrant Required or Not

Com. v. Gelfgatt, 468 Mass. 512, 11 N.E.3d 605 (2014)

On remand from the Massachusetts Supreme Judicial Court, the Superior Court held the defendant in civil contempt. He was under a "clear and unambiguous order *** to unlock the security features of his computers and flash drives by entering his personal and self-created passwords or phrases" and failed to do so. The court found that the defendant's contention that he could not remember the passwords was "dubious."

#Fifth Amendment

***Commonwealth v. Rousseau,* 990 N.E. 2d 543, (Mass. 2013)**

The two appellants were convicted of criminal acts arising out of the burning and vandalizing of four properties. Suspecting their involvement, the police secured a warrant allowing the installation of a GPS device on a vehicle owned by one defendant and in which the other was a passenger. The vehicle was tracked for thirty days and the tracking "tied" the defendants to four criminal acts. They were arrested and subsequent searches yielded incriminating materials. The Massachusetts Supreme Court, on a direct appeal, affirmed the convictions: (1) Relying on *Commonwealth v. Connolly,* 454 Mass. 808 (2009) and *United States v. Jones,* 132 S. Ct. 945 (2012), the court concluded that the appellant owner of the vehicle had a possessory interest sufficient for standing purposes, (2) the other appellant, although a "mere passenger having no possessory interest" in the vehicle, had standing under the Massachusetts Constitution given the facts of the case, and (3) probable cause existed for the issuance of the warrant given, among other things, the appellants' extensive criminal histories and statements made by a cooperating witness, even assuming that certain information was excised from the warrant application.

The court did modify a probationary condition for one appellant. Both appellants had been barred from *any* access to a computer while in prison. Although the court agreed that some restriction was appropriate given that the appellants had sought to publicize their criminal acts, the court concluded that, "given that the Department of Correction had digitized its law library, *** the breadth of the probationary condition would have the practical effect of denying

Rousseau access to the courts" and permitted him to "use the prison library computers for the limited purpose of conducting legal research and other activity related to his case."

#Fourth Amendment Warrant Required or Not

#Miscellaneous

Commonwealth v. Stem, *2014 PA Super 145, 96 A.3d 407 (2014)*

In this post-*Riley* decision, the Superior Court of Pennsylvania affirmed the trial court's suppression of evidence derived from the warrantless search of the defendant's cell phone and "the fruits derived therefrom." The defendant had been arrested and his phone searched on August 14, 2012. The trial court ruled on July 13, 2013. Interestingly, the Superior Court did not consider *any* exception to the warrant requirement!

#Fourth Amendment Warrant Required or Not

Commonwealth v. Tarjick, 87 Mass.App.Ct. 374 (2015)

"This matter involves the interplay between twenty-first century technology and twentieth century search and seizure principles. We hold that the police, while executing a search warrant for nude images of the defendant's thirteen year old stepdaughter on a video camera, cellular telephone ***, and computer, were justified in seizing three memory cards from digital cameras they came upon."

The police secured a warrant that did not include the memory cards as items to seize. However, they searched the contents only after having

secured a second warrant. On appeal from his conviction for child abuse, the defendant argued that evidence derived from the cards should have been suppressed. The Appeals Court held that the cards were "plausibly related to the victim's allegations and were properly seized under the plain view doctrine." Moreover, "[o]n discovery of the memory cards, the officers were also justified in recognizing the possibility that any evidence contained in them could be at risk of erasure or destruction, making it reasonable for the officers to seize the cards to preserve the evidence while applying for the second warrant." The convictions were affirmed.

#Fourth Amendment Particularity Requirement

***Costanzo v. State,* 152 So.3d 737 (Fla. Dist. Ct. App. 2014)**

The appellant, a detective, was convicted of evidence tampering in violation of Florida law. He had made a video recording on his work cell phone of statements made by a suspect in a criminal case in which two other officers, both friends of the appellant, were defendants. After circulating the video, the appellant deleted it from his phone although the video was recovered from two other sources. The conviction was reversed because his conduct was "equivocal." Moreover, "the statute does not criminalize deleting evidence existing in the memory of a particular electronic device, particularly where such evidence resides elsewhere in the electronic ether."

#Miscellaneous

***In re Cunningham,* 2013 NY Slip Op. 04838 (Ct. App. June 27, 2013)**

The petitioner, a former New York State employee, appealed from his discharge for submitting false time reports. To investigate his conduct, the State attached a GPS device to the petitioner's car. The GPS device and two replacements tracked the car for a month, "including evenings, weekends and several days when petitioner was on vacation in Massachusetts. The Court of Appeals reversed: (1) There is a workplace exception to the warrant requirement, (2) "when an employee chooses to use his car during the business day, GPS tracking of the car may be considered a workplace search," and (3) reasonable suspicion of employee misconduct existed to justify the attachment of the device. However, the search was unreasonable because it was excessively intrusive.

#Fourth Amendment Warrant Required or Not

***Demby v. State,* 444 Md. 45 (2015)**

"We are called upon *** to decide whether Petitioner *** was entitled, by application of the rule established in *Riley* [*v. California*], to suppression of evidence obtained as the result of the search of a cell phone incident to his arrest in 2012." At the time of the petitioner's arrest, binding precedent in Maryland allowed a warrantless search. Therefore, suppression was unwarranted by application of the good faith doctrine.

#Fourth Amendment Warrant Required or Not

#Fourth Amendment Good Faith Exception

***In re the Detention of: H.N.,* No. 72003-1-I, 2015 WL 4081790 (Wash. Ct. App. July 6, 2015)**

The detainee was committed for involuntary treatment on findings that she suffered from a mental disorder and posed a likelihood of serious harm to herself. She argued on appeal that the trial court had erred when it admitted as substantive evidence "e-mailed screen shots of text messages" relied on by the State's psychologist. The purported messages were made between the detainee and her boyfriend on an evening when she had been found unconscious and lying in a pool of her own vomit after ingesting liquor and a medication. The Washington Court of Appeals held that the State had made a sufficient *prima facie* showing:

"The record establishes that the emailed screenshots of text messages were authored by H.N. Likewise, they were sent from the cell number associated with H.N. Finally, they were sent from the cell number associated with H.N. Finally, the distinctive characteristics of the messages, taken in conjunction with the circumstances are sufficient to support authentication."

#Trial Materials

***Devega v. State*, 286 Ga. 448 (2010)**

After being convicted of murder and other offenses, the defendant sought a new trial. He argued, among other things, that his trial attorney should have challenged on Fourth Amendment grounds the warrantless "ping" of his cell phone. The police used the phone to

monitor the location of the phone from a public road, distinguishing *United States v. Karo* (which addressed the monitoring of a beeper from a private residence). The court found that the defendant had no reasonable expectation of privacy while traveling in public places.

#Fourth Amendment Warrant Required or Not

***Facebook, Inc. v. Superior Court,* A144315 (Ca. Ct. App. Sept. 8, 2015)**

Three social media providers moved to quash subpoenas for public and private content from user accounts of a murder victim and a witness. The subpoenas were served by two defendants who were indicted and awaiting trial on various charges related to the murder. The providers moved to quash, contending that disclosure of content was barred by the Stored Communications Act. The trial court denied the motion and ordered *in camera* review. The providers appealed. The defendants argued that, regardless of the SCA, the materials were needed to "ensure their right to present a complete defense to the charges against them, and that their Fifth Amendment guarantee of due process and Sixth Amendment right to compulsory process are implicated." The Court of Appeal disagreed and ordered that the motions be granted: "[W]e find no support for the trial court's order for pretrial production of information otherwise subject to the SCA's protections. The court left open the possibility that the defendants might seek content *at trial*, "where the trial court would be far better equipped to balance the Defendants need for effective cross-examination and the policies the SCA is intended to serve." In *dicta,* the

court questioned the constitutionality of the SCA should it be construed to bar a *trial* subpoena by a defendant.

#Discovery Materials

#Trial Related

#Social Media

***Freeman v. Mississippi,* 121 So.3d 888 (Miss. 2013)**

The defendant was arrested from DUI. The stop was recorded on video. The defendant was then transported to a police station, where a blood alcohol test was administered. The defendant subpoenaed the arresting officer for the video tape. There was no response. The video was played at trial. The defendant argued that the video was inconsistent with testimony offered by the officer. After being convicted, the defendant appealed for a trial *de novo.* The defendant secured a preservation order. Thereafter, the defendant learned that the tape had been destroyed. The trial court denied a motion to dismiss but inferred that the video would have been favorable to the defendant. "At trial, the facts were hotly contested." The defendant was again convicted. After an appellate court affirmed the conviction, the Mississippi Supreme Court reversed: (1) "[T]he State was under an affirmative duty via a court order to preserve the video," (2) "the loss of the video while the State was under a court order to preserve the video clearly impaired Freeman's defense," (3) preservation would not have imposed "unreasonable requirements on the police to employ guesswork as to what should be preserved, or to preserve an

unreasonable quantity of evidence," and (4) the destruction of the tape "undermines the confidence in the outcome of the trial."

In ruling, the court made this observation in footnote 4:

"We note that video evidence is different from biological evidence such as DNA samples in that it is much easier to preserve and/or produce to the defense. It need not be subject to testing or preserved using specialized scientific processes. The State offers no excuse as to why it did not comply with the discovery requests and the court order, other than that Officer Patrick did not think he had the software on his computer with which to copy the video. There is no evidence that such software would be difficult to obtain and utilize, especially given the nearly fourteen months that elapsed between the first request for the video and the assertion that the video was destroyed. In making this distinction, we do not suggest that the loss or destruction of biological or like evidence is any less egregious than the destruction of video evidence. We merely note that video evidence is likely to be even easier for the State to produce to defendants."

#Preservation and Spoliation

Galloway v. Town of Hartford, 2012 VT 61 (2012)

A journalist requested records relating to the police's response to a possible burglary in progress. The police used considerable force in restraining the suspect, who turned out to be the homeowner. The police chief and town manager denied the request, claiming the records related to a criminal investigation, and thus, were protected from

disclosure under “exemption five” of the state’s public records act. The journalist filed an action against the town to compel production of the records. The trial court concluded that the records created by police were exempt from disclosure under the state’s public records act “because they were created *during* the course of an investigation into suspected criminal activity.” Because the investigation was terminated without any resulting criminal charges, however, the court held that “any records created *after* the decision that there would be no criminal charges had to be disclosed.” The trial court reasoned that “the records revealing the outcome of an investigation are not records ‘of the investigation,’ but are its product.” The journalist objected to this decision on the grounds that it contravened the purposes of the public records act, and that the criminal investigation ended when the handcuffs were removed from the suspect. The trial court declined to modify its decision and the journalist appealed. The state Supreme Court reversed, holding that the homeowner was subjected to a de facto “arrest,” requiring the disclosure of “all records considered by the trial court that were identified by the police as being generated as a result of the incident.” The Court found “exemption five” inapplicable because the town failed to demonstrate that disclosure “pose[d] a concrete harm to law enforcement interests.” In weighing the competing interests in determining whether the records were public, the Court also noted that “many other states are guided by statutory criteria that provide police and courts with a far better and more defined framework in making decisions about disclosure of this type of record.” Two of the Justices concurred, agreeing with that the result, but stating that the reason why the records did not fall within the exemption was because “there was no crime.” One dissenting justice

found that the plain language of the exemption clearly evidenced a legislative intent "to withhold information on criminal investigations and investigative detentions not resulting in charges, while mandating disclosure of arrests accompanied by a formal criminal charge." The dissenting judge criticized the majority opinion for ignoring the plain language of the statute, and instead, "impos[ing] a variable, or floating, test for public access of police records, requiring a determination of "whether the temporary detention of a suspect amounts to an arrest for purposes of Fourth Amendment protection, even when, as here, no such claim of unconstitutional invasion is at issue. As a result of this "floating" test, the dissenting judge believed that custodians of police records "must now puzzle over "de facto" arrest versus investigative detention not amounting to arrest—a moving target worthy of countless and diverse court decisions."

#Miscellaneous

In re Gee, 2010 IL App (4th) 100275, 956 N.E.2d 460 (2010)

During the prosecution of a murder, newspapers petitioned to intervene and gain access to a sealed search warrant file. The district court granted the petitions to intervene, but ordered the affidavit supporting the search warrant and the inventory to remain sealed. The newspapers appealed. The Court of Appeals affirmed, holding the presumption of public access in criminal proceedings did not attach to sealed-search warrant affidavit and inventory, either under the First Amendment, common law, or state law. The Court noted that federal circuit courts were split over the issue, but emphasized that the

warrant application process had not been historically open to the public. Further, even assuming that a qualified right of access applied, the Court found that the generalized public interest was far outweighed by the substantial probability of compromising and interfering with an ongoing investigation. The Court stated that a warrant application involved no public or adversary proceedings.

#Trial Related

***Gill v. State*, 300 S.W.3d 225 (Mo. 2010)**

The defendant, sentenced to death for first-degree murder, sought post-conviction relief, arguing that he was denied effective assistance of counsel. Trial counsel had been given a report about the contents of the murder victim's computer, which had been found in the defendant's car. The good character of the victim had been put in issue in the death penalty phase of the defendant's trial and, if counsel had investigated the computer, they would have found child pornography, with which they could have attacked the victim's character. Reserving the court below, the Supreme Court held that trial counsel's failure to investigate the contents constituted ineffective assistance of counsel and remanded for retrial of the penalty phase. The Supreme Court rejected a *Brady* challenge, noting that the report had been made available to trial counsel.

#Trial Related

***In re Globe Newspaper Co., Inc.*, 461 Mass. 113, 958 N.E.2d 822 (2011)**

After a woman was indicted by a grand jury with the murder of her brother, a newspaper filed a motion to inspect and copy the inquest report and transcript of the inquest proceedings. The judge denied the newspaper's motion and ordered the inquest report and transcript to be impounded until further order of the court. The newspaper challenged the denial of its motion, claiming that the judge erred in concluding that the impoundment was governed by the common-law principles in *Kennedy v. Justice of the District Court of Dukes County*, 356 Mass. 367, 252 N.E.2d 201 (1969) (*Kennedy*), rather than the statute addressing inquest reports enacted after the *Kennedy* decision. The Massachusetts Supreme Court held that the report and transcript became presumptively public documents once the district attorney filed a notice, which indicated that the grand jury returned an indictment, with the superior court stating. The case was remanded with instructions to vacate the judge's denial of the motion.

#Trial Related

***Griffin v. State*, 419 Md. 343, 19 A.3d 415 (2011)**

In this appeal of a second-degree murder conviction where a woman was shot seven times in a bathroom bar, the appellant argued that that court erred in allowing the state to introduce a printout of a witness' MySpace profile page that said "I HAVE 2 BEAUTIFUL KIDS…. FREE BOOZY!!!! JUST REMEMBER, SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!" without proper authentication. The court noted that it saw "no reason why social media profiles may not be circumstantially

authenticated in the same manner as other electronic communication - by their content." The court held that the evidence was authentic because the MySpace page identified the user's birth date, discussed her boyfriend, Boozy, and displayed her photograph within the MySpace page.

#Trial Related

#Social Media

***J.B. v. New Jersey State Parole Bd.,* 433 N.J. Super. 327 (App. Div. 2013)**

The appellants, who were convicted of sex offenses, challenged terms of post-incarceration supervision that restricted their access to "social media web sites on the Internet" on, among other things, First Amendment and due process grounds. The Appellate Division rejected the *per se* challenge: "The manifest objective of the Internet restrictions in the authorizing statute and the Parole Board's regulations is not to eliminate the ability of released offenders *** to access the Internet in its entirety. Instead, the provisions are legitimately aimed at restricting such offenders from participating in unwholesome interactive discussions on the Internet with children or strangers who might fall prey to their potential recidivist behavior." The court did, however, "urge the Parole Board to be amenable to fine-tuning the Internet regulations as technology advances and the nomenclature and uses of cyberspace continue to evolve."

#Miscellaneous

***Kelly v. State,* 436 Md. 406, 82 A.3d 205 (2013)**

Over an eleven-day period in 2010, police conducted warrantless tracking of the defendant's vehicle via a GPS device attached to it. The tracking led to the issuance of search warrants for various properties and charges being filed against the defendant for burglary. The defendant moved to suppress evidence, arguing that the placement of the device violated the Fourth Amendment. The motions were denied. The defendant was convicted and appealed. *United States v. Jones* was decided while the appeal was pending. The Maryland Court of Special Appeals affirmed: Pre-*Jones* law in Maryland permitted warrantless tracking and, because the police had acted in "objectively reasonable reliance" on "binding appellate precedent," suppression was not appropriate.

#Fourth Amendment Good Faith Exception

***Kobman v. Commonwealth,* 65 Va. App. 304, 777 S.E.2d 565 (2015)**

The defendant was convicted on multiple counts of possession of child pornography. The Commonwealth had secured a warrant to search the defendant's residence for evidence of child pornography. In response to a statement he made, the Commonwealth seized various devices and media. Images were found in the recycle bin and unallocated space of seized computers. The images were retrievable by the defendant from recycle bins but those in allocated space were "invisible" and required specialized software to retrieve. The Virginia Court of Appeals

held that there was no evidence that the defendant was "aware of, or exercised dominion and control" over the images in the unallocated space and reversed his convictions as to those images. As to the images in the recycle bin, the court held that there was sufficient evidence that the defendant "was aware of the presence of the *** illicit photographs *** and exercised dominion and control over the contraband."

#Trial-Related

#Miscellaneous

Long v. State, **No. 08-13-00334-CR, 2015 WL 3984950 (Tex. App. June 30, 2015)**

The appellant's daughter made a "surreptitious recording" of speeches made by a public high school basketball coach in a locker room of a public high school. The appellant was convicted under the Texas wiretap statute of procuring the recording and disclosing it to an assistant principal. In a case of first impression, the Texas Court of Appeals reversed. The statute required that the speaker have a reasonable expectation of privacy in making the oral communication and the court concluded that the coach had none: "we can extrapolate that society is not willing to recognize that a public school educator—whether a teacher or a coach—has a reasonable expectation of privacy in his or her instructional communications and activities, regardless of where they occur, because they are always subject to public dissemination and generally exposed to the public view."

#Fourth Amendment Warrant Required or Not

***Lowe v. Mississippi,* 127 So.3d 178 (Miss. 2013)**

"The State indicted *** Lowe on five counts of exploitation of a minor, alleging that he had downloaded sexually explicit images and videos of children via the Internet to his laptop computer. Because the State had no direct evidence ***, its case depended on the opinions of its expert witnesses." The defendant's request for funds to retain his own expert was denied and he was convicted. The Mississippi Supreme Court reversed: "Because the trial court's denial of Lowe's requested expert funds denied him the opportunity to prepare an adequate defense, the decision rendered Lowe's trial fundamentally unfair." The court rejected the State's argument that there was overwhelming evidence against the defendant because that evidence "primarily consists of opinions provided by the State's expert."

#Trial Related

***In re M.C.,* No. 64839, 2015 WL 865320 (Nev. Feb. 26, 2015)**

The appellant was adjudicated a delinquent based on a threatening Facebook posting. His post was discovered by a police officer who "monitored the Facebook activity of approximately 130 individuals by befriending them under a fictitious name." Affirming the adjudication, the Nevada Supreme Court held that the officer's monitoring did not violate the Fourth Amendment: "As soon as he released the post to a third party—specifically, his Facebook friends—M.C. lost any objectively reasonable expectation of privacy." The court also held that

the posting had been properly authenticated through the officer's testimony: "he admitted making the *** post, subsequent communications referred back to that post, and there is no indication that someone else accessed his Facebook account." Moreover, the officer's testimony was not hearsay because the content of the post were party admissions.

#Fourth Amendment Warrant Required or Not

#Trial Materials

#Social Media

***In re Maine Today Media Inc*., 59 A.3d 499 (Me. 2013)**

The trial court in this criminal case initiated jury selection through a process regularly used in Maine courts that provided for extensive individual voir dire, with the practical effect that the public was excluded from the voir dire process. After jury selection had begun, the trial court received a letter from counsel for a media company asserting a greater right to public access. The court initially agreed to open the process to the public upon the defendant's agreement. After considering his options and consultation with his attorney, however, the defendant expressed concerns about the ability to draw an impartial jury if the process used by the court was changed. The court then agreed to continue with the individual voir dire process. After jury selection had begun, the media company filed a motion to intervene. Given the lateness of the request and a concern that juror candor would be reduced, the trial court denied the motion. The media

company filed an interlocutory appeal. The Supreme Court of Maine held that, although the trial court exercises substantial discretion over the mode and conduct of voir dire, the trial court's generalized concern that juror candor might be reduced if voir dire was conducted in public was insufficient to bar the public or media from the entirety of the process. Accordingly, the matter was remanded for the trial court "to conduct the remaining voir dire in a presumptively public manner, exercising its considerable discretion to prevent the dissemination of sensitive juror information." The Supreme Court stated that public's access to the jury selection that already occurred could be "addressed, at the court's discretion, by the release of appropriately redacted transcripts.

#Trial Related

In re Malik J., 240 Cal. App. 4th 896, 193 Cal. Rptr. 3d 370 (2015)

A minor had been adjudicated a delinquent and conditions of probation imposed on him. After he admitted violating the conditions by committing robberies that might have been furthered through the use of electronic devices additional terms were imposed, including that he and his family "provide all passwords and submit to searches of electronic devices and social media sites." The Court of Appeal modified the conditions to omit the reference to the minor's family as well as the requirement that the minor turn over passwords to social media accounts. The conditions were also modified to restrict searches to devices found in his custody or control as these might be stolen property.

#Miscellaneous

***People v. Barnes,* 216 Cal. App. 4th 1508 (2013)**

The defendant entered a conditional plea to, among other things, armed robbery after his motion to suppress was denied. The defendant had stolen a wallet which contained a cell phone. Law enforcement, with the consent of the owner of the stolen phone, used GPS data to locate the defendant. Affirming the denial of the motion, the Court of Appeals held that the defendant had no reasonable expectation of privacy in data generated from a stolen phone. The court also rejected the argument that the data could not be "verified."

[Note that the court here distinguished *United States v. Jones* on various grounds].

#Fourth Amendment Warrant Required or Not

***People v. Diaz*, 213 Cal. App. 4th 743, 746, 153 Cal. Rptr. 3d 90, 92 (2013)**

The defendant appealed her conviction for involuntary manslaughter and vehicular manslaughter while intoxicated. The defendant contended that, "the admission of evidence obtained through the warrantless seizure of the sensing diagnostic module (SDM) from her previously impounded vehicle and the downloading of data from the device violated her Fourth Amendment rights." The data seized pertained to the vehicle's speed and braking immediately before a

deadly impact and the vehicle had been impounded. The Court of Appeal affirmed.

Addressing an issue of first impression in California, the court held: (1) The "automobile exception" to the warrant requirement was applicable, (2) probable cause existed for the search of the SDM, and (3) the scope of the warrantless search was not unreasonable. The court also held that the warrantless search was valid because the vehicle was itself evidence of the crime.

The Court of Appeal rejected the defendant's reliance on *United States v. Jone*s: "Here, the trespass theory underlying Jones has no relevance and *** the purpose of the SDM was not to obtain information for the police."

#Fourth Amendment Exigent Circumstances

***People v. Diaz,* 51 Cal. 4th 84, 244 P.3d 501 (2011)**

The defendant pled guilty to transportation of a controlled substance. On appeal, he challenged the denial of his motion to suppress evidence derived from the warrantless search of the contents of his cell phone. The contents had been searched some 90 minutes after the defendant had been arrested. Over a strong dissent, the California Supreme Court affirmed, holding that the search was incident to the defendant's lawful arrest. The court analogized the cell phone to clothing worn by an arrestee or a cigarette case taken from the arrestee's person. The court also rejected the argument that the validity of a search incident to arrest should depend on the "nature and character" of the item seized.

The majority closed by noting that it was bound by decisions of the United States Supreme Court and that, if "the wisdom of the high court's decisions 'must be newly evaluated' in light of modern technology …, then that reevaluation must be undertaken by the high court itself."

#Fourth Amendment Warrant Required or Not

People v. Goldsmith, 59 Cal. 4th 258, 326 P.3d 239 (2014)

The defendant was found guilty of failing to stop at a traffic light at an intersection based on evidence generated by an "automated traffic enforcement system (ATES)" that was introduced into evidence by an officer. She argued on appeal that the evidence had not been properly authenticated and constituted hearsay. The California Supreme Court affirmed the conviction. *Permissive* statutory presumptions supported the finding that the evidence was accurate representations of data stored in the ATES. The officer's testimony was sufficient to support a finding that the evidence was genuine. The Supreme Court rejected the argument that testimony from someone with "special expertise" was necessary because digital images were involved. Further, the court held that the evidence was not a "statement of a person" and was therefore not hearsay.

#Trial Materials

***People v. Harris*, 36 Misc. 3d 868, 949 N.Y.S.2d 590 (Crim. Ct. 2012)**

After the defendant was charged with disorderly conduct, the government sent subpoena *duces tecum* to third-party online social networking service provider Twitter, seeking to obtain the defendant's user information and Twitter postings ("tweets") during a relevant period. The defendant's motion to quash was denied for lack of standing. The provider then moved to quash. The court stated that it was a case of first impression, "distinctive because it is a criminal case rather than a civil case, and the movant is the corporate entity (Twitter) and not an individual." In denying Twitter's motion, the court rejected its arguments that the defendant had standing to challenge the subpoena, a Fourth Amendment privacy interest, and that the subpoena and order violated the SCA. The court noted there was no *physical* intrusion into the defendant's personal property -- the Twitter account -- because defendant "had purposely broadcast to the entire world into a server 3,000 miles away." Further, there was no reasonable expectation of privacy in the tweets because "If you post a tweet, just like if you scream it out the window." The court distinguished a tweet from a "private email, a private direct message, a private chat, or any of the other readily available ways to have a private conversation via the internet that now exist." To access those private dialogues, the court said, a warrant based on probable cause was required. The court found no unreasonable burden to Twitter, "as it does not take much to search and provide the data to the court." The court added: "[s]o long as the third party is in possession of the materials, the court may issue an order for the materials from the third party when the materials are relevant and evidentiary."

#Trial Related

#Social Media

***People v. Holmes,* Case No. 12CR1522 (Colo. Dist. Ct. Nov. 7, 2013)**

The defendant moved to suppress records obtained by law enforcement from two Internet dating sites. The motion was denied: "Part of the motion is moot because the prosecution does not intend to introduce into evidence records containing any communications between the defendant and other members of the websites. The rest of the motion fails because the defendant did not meet his burden of demonstrating a constitutionally protected expectation of privacy in the profile records and subscription records." As to the latter ruling, the court reasoned that the defendant had no reasonable expectation of privacy under the Colorado or United States constitutions because he "posted his profiles with the intent to make them accessible and, because, before law enforcement had sought the records, the profiles had been published. As to the subscription records, the court drew an analogy between voluntarily submitting information to an internet site administrator and submitting voluntarily information to third-parties such as telephone companies (*citing Smith v. Maryland,* 442 U.S. 735 (1979)), and found that the defendant had no reasonable expectation of privacy under the Fourth Amendment. The court also distinguished prior Colorado rulings and held there was no reasonable expectation under Colorado law.

#Fourth Amendment Warrant Required or Not

***People v. Kent*, 79 A.D.3d 52, 910 N.Y.S.2d 78 (2010) *aff'd as modified,* 19 N.Y.3d 290, 970 N.E.2d 833 (2012)**

The defendant, a college professor, had been convicted of child pornography-related offenses after an employee of the college had run a virus scan on the defendant's office computer and found files of young girls, after which the college turned the hard drive over to police along with a "Consent to Search" form. In affirming the judgment of conviction, the Appellate Division addressed questions of first impression in New York. Among other things, the court held that "the mere existence of an image automatically stored in the cache, standing alone, is legally insufficient to prove either knowing procurement or knowing possession of child pornography." However, there was sufficient evidence to support the defendant's conviction. The court also rejected an ineffective assistance argument based on the failure of defense counsel to move to suppress the evidence collected from the hard drive. The defendant had no reasonable expectation of privacy in any personal files stored on his office computer because the computer was the property of the college and, therefore, there was a legitimate explanation for counsel's conduct.

#Miscellaneous

***People v. Klapper,* 28 Misc. 3d 225, 902 N.Y.S.2d 305 (N.Y. Crim. 2010)**

The defendant was charged with unauthorized use of a computer under

New York law. The defendant was alleged to have installed keystroke-tracking software on a computer in his office and to have used that software to access the personal email account of an employee. On a motion to dismiss, the court held the allegations did not establish that the access was "without authorization." The defendant's ownership of, and authority over, the computer were of central importance. Moreover, the employee had a diminished expectation of privacy in the email communications. Absent allegations that the defendant had exceeded his right of access or that there was some restriction on that right, the motion was granted.

#Miscellaneous

***People v. Lewis,* 23 N.Y.3d 179, 12 N.E.3d 1091 (2014)**

The defendant was convicted of various offenses arising out of his use of forged credit cards in Manhattan. His phones were tapped pursuant to a warrant. He was under visual surveillance. However, because of traffic congestion in Manhattan, investigators installed a GPS tracking device on his vehicle without a warrant. After his conviction, the defendant appealed challenged (among other things) the warrantless installation. The Court of Appeals affirmed. The Court acknowledged that there the warrantless installation was unconstitutional under *United States v. Jones.* However, "the use of the GPS device, although amounting to a constitutional violation, was nonetheless harmless because it provided information redundant to that which investigators had already obtained legally. The People also presented overwhelming evidence of defendant's guilt ***."

#Fourth Amendment Warrant Required or Not

#Miscellaneous

***People v. Nakai*, 183 Cal. App. 4th 499, Cal. Rptr. 3d 402 (2010)**

The defendant was found guilty under California law of attempting to send harmful material to a minor with intent to seduce. On appeal, the conviction was affirmed. Although the defendant wanted a Yahoo! dialogue with someone posing as a minor to be confidential, he had no reasonable expectation of privacy. Among other things, the defendant was on notice that dialogues might be shared in the investigation of illegal conduct and that others might have access to the dialogue.

#Trial Related

***People v. Superior Court (Chubbs*), No. B258569, 2015 WL 139069 (Cal. Ct. App. Jan. 9, 2015)**

In 2011, as part of a "cold case investigation," a DNA test was conducted on vaginal swabs from the victim of a 1977 murder. In 2012, the defendant was arrested for an unrelated reason and his DNA was found to match that taken from the victim. The defendant was charged with the murder. Thereafter, a lab conducted further testing of the victim's DNA through the use of its "TrueAllele software" and issued a report that further incriminated the defendant. The defendant moved to compel production of the source codes for the software. After a series of procedural "meanderings" the trial court ordered that the

source codes be disclosed. The People took an interlocutory appeal which the Court of Appeal granted. The parties did not dispute that the source code was a trade secret. The Court of Appeal held that the holder of a trade secret could not be compelled to disclose it under California law, "even subject to a protective order and the closing of certain proceedings, without a showing that the trade secret is relevant and necessary to the defense." On the facts before it,

> Chubbs [the defendant] has received extensive information regarding TrueAlelle's methodology and underlying assumptions, but he has not demonstrated how TrueAlelle's source code is necessary to his ability to test the reliability of its results. We therefore conclude that Chubbs has not made a prima facie showing of the particularized need for TrueAlelle's source code.

The Court of Appeal also rejected the defendant's argument that his right of confrontation required that the source code be disclosed because the right did not apply to *pretrial* discovery of privileged information.

#Discovery Materials

#Trial-Related

***People v. Valdez*, 201 Cal. App. 4th 1429, 135 Cal. Rptr. 3d 628 (2011)**

The defendant was convicted of two counts of attempted murder, four counts of assault with a firearm, and two counts of street terrorism. On appeal, the defendant contended the trial court erroneously admitted pages from his MySpace social networking site that included his gang moniker ("Yums"), a photograph of him making a gang hand signal, and

written notations including “T.L.F.,” “YUM $ YUM,” “T.L.F.'s ’63 Impala,” “T.L.F., The Most Wanted Krew by the Cops and Ladiez,” and “Yums You Don't Wanna F wit[h] this Guy.” The MySpace page included the following under “Groups”: “CO 2006, Thug *Life/Club Bounce. O.C.'s Most Wanted G's. Viva Los Jews. Screaming Thug Life” and, in an interests section, stated: “Mob[b]ing the streets and hustling, chilling with homies, and spending time with my mom.” An investigator from the district attorney's office testified he printed out the web pages a year *before* the shootings, after accessing them as part of his internet search using the terms “T.L.F. Santa Ana. The gang expert relied on the MySpace page and other evidence as a basis for his opinion the defendant was an active T.L.F. gang member. The defendant objected to admission of the MySpace evidence based on lack of authentication, hearsay, and that it was more prejudicial than probative. The trial court admitted the MySpace printouts for specified purposes and not for the truth of any express or implied assertions. In particular, the court instructed the jury to consider the MySpace evidence for the limited purposes of (1) corroborating a victim's statement to investigators shortly after the first shooting that the victim recognized the defendant from the MySpace site, and (2) as foundation for the gang expert’s testimony. The appellate court affirmed, finding the MySpace evidence sufficiently authenticated, not improper hearsay evidence, and not unduly prejudicial.

#Trial Related

***People v. Weissman*, 46 Misc. 3d 171, 997 N.Y.S.2d 602 (Crim. Ct. 2014)**

In this post-*Riley* trial court decision, the defendant had been charged with two counts of criminal contempt for using his cell phone inside a courthouse to take pictures in violation of a rule. The defendant was observed inside a courtroom with his phone apparently turned on, although there was no proof that he had used the phone to take pictures. The defendant was similarly observed in a corridor. A court officer in the corridor directed the defendant to show images on the phone to the officer, one of which appeared to be that of a witness. An office inside the courtroom then did the same and observed an image of a witness. The defendant moved to suppress and the motion was granted. Although the court acknowledged that the defendant had a diminishing expectation of privacy in a courthouse, the judge found that the defendant had been coerced in giving the officers access to the images.

#Fourth Amendment Warrant Required or Not

***Rutland Herald v. Vermont State Police*, 191 Vt. 357, 49 A.3d 91 (2012)**

The plaintiffs made a public records request to the state police relating to a criminal investigation into the possession of child pornography by employees at a state police academy. The State refused, citing statutory provisions permitting the withholding of records dealing with the detection and investigation of crime. The plaintiffs filed suit and the trial court granted summary judgment in favor of the state. The appellate court affirmed and held that the legislative intent of the state

public records act was that criminal investigative records be permanently exempt, citing the omission of temporal language in this area that pervades other areas of the PRA.

#Trial-Related

Sinclair v. State, 444 Md. 16 (2015)

After conviction on carjacking-related charges, the petitioner appealed from the denial of his motion to suppress incriminatory images taken from his flip phone seized and searched incident to arrest. Between the conviction and the acceptance of the appeal the United States Supreme Court decided *Riley v. California*. Although the Maryland Court of Appeals held that the Petitioner had waived his right to move to suppress, it nevertheless held that one image was of a screen saver "readily apparent" to the arresting officer and was admissible under the plain view doctrine:

> Under the categorical approach favored by the Supreme Court in *Riley,* an officer who seizes a flip cell phone incident to an arrest may physically inspect and secure the phone, which would include an examination of the phone and its case for weapons, powering off the phone, and removing its batteries. Such actions would inevitably involve physically opening a flip phone, although they would not entail a search of its data. Thus, physically opening a cell phone would not be an unlawful search under *Riley*. And a photograph of a screen server image in plain view when the phone is physically opened—an image that the investigator immediately recognized as the stolen item under investigation—would not be subject to suppression.

The officer found two other images in his warrantless search. The Court of Appeals held that admission (one being identical to the screen server image) was harmless error.

#Fourth Amendment Warrant Required or Not

#Fourth Amendment Plain View

***Smallwood v. State*, 113 So. 3d 724 (Fla. 2013)**

The defendant was arrested for, among other things, armed robbery. His cell phone was seized during a search incident to arrest. After the defendant had been secured, the arresting officer accessed and searched the content of the phone. The officer saw five images relevant to the crime. Thereafter, the prosecutor obtained a search warrant and viewed the images. Over the defendant's objection, the trial court allowed the images into evidence. On appeal, the intermediate appellate court affirmed the defendant's convictions but certified a question to the Supreme Court with regard to the search incident to arrest. Distinguishing *United States v. Robinson,* 414 U.S. 218 (1973), the Florida Supreme Court held that, "the electronic devices that operate as cell phones of today are materially distinguishable from the static, limited-capacity cigarette pack in *Robinson,"* and that, under the facts before it, a warrant was required to search the phone: "In our view, allowing law enforcement to search an arrestee's cell phone without a warrant is akin to providing law enforcement with a key to access the home of the arrestee." The court rejected the State's attempt to rely on the good faith exception to the warrant requirement and reversed the convictions, concluding that the admissions of the

images were not harmless error.

#Trial Related

#Fourth Amendment Warrant Required or Not

***Smith v. State*, 136 So. 3d 424 (Miss. 2014)**

The defendant was convicted of capital murder in the death of a seventeen-month-old child. On appeal, he challenged, among other things, the admissibility of several Facebook messages. The Court of Appeals affirmed, holding the messages had been properly authenticated. The Mississippi Supreme Court granted *certiorari* to address the admissibility issue and affirmed the conviction but held that the Court of Appeals had erred on authentication.

The State had introduced at trial two Facebook messages and an email notification containing a Facebook message. However, the Supreme Court held that the State "failed to make a prima facie case that the Facebook profile whence the messages came belonged to Smith, as the only information tying the Facebook account to Smith is that the messages purport to be from a 'Scott Smith' and are accompanied by a very small, grainy, low-quality photograph that we can only assume purports to be Smith." Moreover, there was no *prima facie* showing that any messages were actually sent by the defendant. However, the defendant's conviction was affirmed as the evidence of his guilt was overwhelming. **[Note that the Court's analysis relies on, among other decisions, *Griffin v. State,* 419 Md. 343, 19 A.3d 415 (2011)].**

#Fourth Amendment Warrant Required or Not

#Social Media

***Spence v. State,* 444 Md. 1 (2015)**

The petitioner sought to suppress evidence derived from his cell phone, the contents of which were searched without a warrant incident to his arrest. The Maryland Court of Appeals affirmed the denial of the motion based on the arresting officer's good faith reliance on pre-*Riley v. California* binding precedent.

#Fourth Amendment Warrant Required or Not

#Fourth Amendment Good Faith Exception

***S.S.S. v. M.A.G.*, No. A-1623-09T2, 2010 WL 4007600 (N.J. Super. Ct. App. Div. Oct. 14, 2010) (*per curiam*)**

This is a domestic violence action arising out of a failed relationship and an alleged assault. The trial judge granted relief to the plaintiff. In doing so, the trial judge refused to admit into evidence as hearsay records of the defendant's E-Z Pass use, which the defendant offered to show that he could not have been at the scene of the assault. The Appellate Division reversed. The records qualified as a "business record," were thus admissible as a hearsay exception, and exclusion was prejudicial in this "classic 'he said-she said' dispute."

#Trial-Related

***State v. Ates*, 217 N.J. 253, 86 A.3d 710 (2014)**

In the course of a murder investigation, law enforcement officials secured New Jersey court orders pursuant to the New Jersey Wiretap Act that allowed them to intercept communications over various phones. Intercepted communications included conversations between speakers in Florida and Louisiana, including the defendant, a Florida resident, who was convicted of the murder. The defendant appealed, contending, among other things, that the Wiretap Act "should be declared unconstitutional because it permits New Jersey authorities to act outside their jurisdiction and wiretap individuals with no connection to New Jersey." The New Jersey Supreme Court rejected the argument: (1) Two findings that a judge must make under the Act "require a direct link to New Jersey;" (2) the "point of interception" as defined in the Act is a "listening post" in New Jersey.

#Miscellaneous

***State v. Bailey,* 2010 ME 15, 989 A.2d 716 (2010)**

After conviction of various child pornography-related offenses, the defendant appealed from the denial of his motion to suppress evidence. Police had been led to the defendant's apartment through their investigation of a peer-to-peer networking program. After a search of a nearby home, the police learned that someone was using an unsecured wireless router to access the network and disseminate child pornography. After turning off the router, a detective gained access to the apartment by telling the defendant that he was canvassing the neighborhood to see if anyone had a problem with computers being

wrongfully accessed. The detective then gained access to the defendant's computer with the defendant's consent and searched it for files containing child pornography. The detective found, but did not open, the files. The defendant then acknowledged having a "problem" with child pornography and consented to a physical search, which yielded tapes that further implicated the defendant and adverse witnesses. On appeal, the Supreme Judicial Court reversed. The court concluded that the defendant had standing to challenge the search of his computer: He had a reasonable expectation of privacy in the computer and its contents when not being accessed through the network. Next, the court held that the defendant had consented to the initial search of the computer. Under the circumstances, the detective's deception was not such as to vitiate the consent. However, the detective exceeded the scope of the consent when "he ran a general search for *all* of the video files" (emphasis in original). Suppressing the evidence secured through that search, the court remanded for consideration of an issue not on appeal: Whether other evidence should be suppressed as "the fruits of the poisonous tree."

#Fourth Amendment Warrant Required or Not

***State v. Brereton,* 2013 WI 17, 345 Wis. 2d 563, 826 N.W.2d 369 (2013)**

The defendant was a suspect in a string of burglaries. After visually monitoring the defendant's vehicle, law enforcement conducted a stop based on non-criminal vehicular violations. The vehicle was towed to an impound lot where a GPS device was installed after an order was obtained. The vehicle was then returned to the defendant. Using data

from the GPS, the defendant was tied him to a crime and arrested. The defendant appealed the denial of his motion to suppress evidence obtained through the monitoring of a GPS device installed on his vehicle. The installation and monitoring had been done through a warrant. The defendant argued that law enforcement "lacked probable cause to seize his vehicle and move it to another location where a GPS device could be safely installed" and that, "the GPS tracking *** utilized more advanced technology than was contemplated under the warrant, thereby effecting an unreasonable search through execution of the warrant." The Wisconsin Supreme Court affirmed the denial of the motion: (1) "[T]he seizure of Brereton's vehicle was supported by probable cause that the vehicle was, or contained, evidence of a crime, and was therefore permissible under the Fourth Amendment," (2) "the three-hour seizure of Brereton's vehicle, whereby officers were able to install the GPS device, did not constitute an unreasonable seizure under the Fourth Amendment, as applied to automobiles," and (3) "the technology used in conducting the GPS search did not exceed the scope of the warrant."

#Fourth Amendment Warrant Required or Not

***State v. Carlson*, 2010 WI App 1, 322 Wis. 2d 735, 778 N.W.2d 171 (2010) (*per curiam*)**

The defendant appealed from a conviction for possession of child pornography. Central to the trial was the defendant's allegation that he did not knowingly download the pornographic images but that, instead, he visited the Web sites accidentally or was involuntarily by a virus. The

defendant argued on appeal that he was denied effective assistance of counsel because the computer expert selected by counsel was not "sufficiently knowledgeable." The court rejected the argument: "Counsel did not perform deficiently simply because the expert she located did not provide as much helpful testimony" as a new, post-verdict expert could have. Moreover, the evidence presented demonstrated a high probability of the defendant's guilt.

#Trial Related

***State v. Combest,* 271 Or.App. 38 (2015)**

The defendant was convicted of multiple courts related to child sexual abuse. "[W]e must determine whether the officers' use of Shareaza LE to seek out and download files from defendant on a peer-to-peer network—and to obtain the IP address, GUID, and hash value associated with those files" invaded the defendant's protected privacy interest and constituted a "search" under the Oregon Constitution. The Oregon Court of Appeals held that there had not been a search: (1) The information obtained was available to other network users; (2) the police engaged in limited observation of particular conduct rather than "pervasive surveillance" of the defendant's life. "And the fact that technology has created efficiencies in police practice does not mean that police conduct a 'search' when they use it."

#Fourth Amendment Warrant Required or Not

***State v. Dabas*, 215 N.J. 114, 71 A.3d 814 (2013)**

A jury found the defendant guilty of murder and attempting to leave the scene of a fatal motor vehicle accident. His conviction was based largely on statements he made. An investigator's handwritten notes of the interview during which the statements were made were purposefully destroyed in violation of a court rule. The trial court declined to give an adverse inference instruction. The Appellate Division reversed because the instruction should have been given. The State appealed.

The New Jersey Supreme Court affirmed the Appellate Division: (1) The destruction of the notes violated a court rule, (2) the notes should have been turned over to the defendant in post-indictment discovery under New Jersey's "open file" policy, (3) the notes were critical to testing the credibility of the investigator, who testified at trial, and (4) an adverse inference instruction was a permissible remedy for the spoliation that took place.

#Preservation and Spoliation

***State v. Dingman*, 149 Wash. App. 648, 202 P.3d 388 (2009)**

The defendant appealed from a conviction for theft and money laundering. The trial court had denied the defendant's requests for access to computer information in a format other than that used by the State. Noting the State's obligation to provide meaningful access to hard drive copies, the Court of Appeals reversed the conviction. The defense was entitled to use its own systems in analyzing the computer

information.

#Miscellaneous

***State v. Earls*, 214 N.J. 564, 70 A.3d 630 (2013)**

The police were investigating a series of burglaries. The defendant was identified as the perpetrator and a warrant issued for his arrest. In an effort to locate the defendant and his girlfriend (who, it was feared, might be harmed by the defendant), the police obtained cell-phone location information from a service provider without a court order or warrant on three occasions. The defendant was arrested and indicted. He pled guilty after his motion to suppress was denied by the trial under the "emergency aid" exception to the warrant requirement. The defendant appealed his sentence. The Appellate Division affirmed, concluding that the defendant did not have a reasonable expectation of privacy in his location information.

The New Jersey Supreme Court reversed. It held: "The New Jersey Constitution protects an individual's privacy interest in the location of his or her cell phone. Users are reasonably entitled to expect confidentiality in the ever-increasing level of detail that cell phones can reveal about their lives. Because of the nature of the intrusion, and the corresponding, legitimate privacy interest at stake, we hold today that police must obtain a warrant based on a shoeing of probable cause, or qualify for an exception to the warrant requirement, to obtain tracking information through the use of a cell phone." The court applied this new rule to the case before it and to future cases and remanded to the Appellate Division to consider the applicability of the emergency aid

doctrine.

#Fourth Amendment Warrant Required or Not

***State v. Esarey*, 308 Conn. 819, 67 A.3d 1001 (2013)**

The defendant was convicted of, among other things, promoting a minor in an obscene performance. On appeal, he challenged the denial of his motion to suppress the fruits of the search of his Google e-mail account, arguing that the court lacked authority to "issue an extraterritorial *** warrant *** for evidence contained in e-mail servers in another state [California]." Declining to address the issue, the Supreme Court held that, given "that mountain of other evidence" against the defendant, "any impropriety in the issuance and execution of the Gmail warrant was, beyond a reasonable doubt, harmless error that did not affect the verdict ***."

[Note the following: "given the increasing significance of electronically stored communications to the investigation and adjudication of criminal cases, we urge our legislature to undertake a review of Connecticut's relevant statutory scheme to ensure its consistency with federal and sister state provisions authorizing service providers to honor and facilitate the service of warrants issued by-out -of state judges *** "].

#Fourth Amendment Good Faith Exception

***State v. Estrella*, 230 Ariz. 401, 286 P.3d 150 (Ct. App. 2012)**

The defendant was convicted of, among other things, transportation of marijuana for sale. During an investigation, law enforcement attached a GPS device to a van owned by the defendant's employer and used by the defendant to transport the marijuana. The device was attached in a public parking lot and GPS data was observed over several days. The defendant moved to suppress evidence derived from the data, relying on *United States v. Jones.* The trial court denied the motion. The Court of Appeals affirmed the conviction: (1) The court declined to address whether the warrantless use of the GPS was a search under the trespass analysis of *Jones*; (2) the defendant had no reasonable expectation of privacy in the placement of the device and the monitoring of the van's movement; and (3) the court declined to address whether extended surveillance might intrude on a reasonable expectation of privacy.

#Fourth Amendment Warrant Required or Not

***State v. Hamlin,* No. COA14-1191, slip op., 2015 WL 4429684 (N.C. Ct. App. July 21, 2015)**

The defendant was convicted of felony larceny after breaking and entering. The evidence against him consisted of gift cards that had been stolen from a church. The director of security for the issuer of the gift was permitted, over the defendant's hearsay objection, to testify about ownership and use of the cards based on printouts of electronic records maintained and accessed by the issuer and stored on a third-party secured server. The North Carolina Court of Appeals affirmed.

Testimony about the cards was admissible under the business records exception to the hearsay rule. The court held that the cards had been sufficiently authenticated by the director although he did not himself create the data pertaining to the cards. He testified that he understood how the data was created, collected and transmitted. This was sufficient for admissibility.

#Trial Materials

***State v. Hinton,* 179 Wash.2d 862, 319 P.3d 9 (2014) (*en banc*)**

The police arrested an individual for possession of heroin and seized his iPhone. Without a warrant, an officer looked through the iPhone and saw an incriminated text message. The officer arranged a meeting with the sender through a series of messages and arrested him. When the sender was being booked a text message was received on the iPhone from the defendant, another meeting was arranged, and the defendant arrested for a drug transaction. The defendant moved to suppress, arguing that the officer's conduct violated the Washington State Constitution as well as the Fourth Amendment. The motion was denied and the defendant pled guilty, reserving his right to appeal. The intermediate appellate court affirmed. The Washington Supreme Court reversed on the basis of the State Constitution: "Just as subjecting a letter to potential interception while in transit does not extinguish a sender's privacy interest in its contents, neither does subjecting a text message to the possibility of exposure on someone else's phone." Although the defendant assumed the risk that the recipient of his text message would betray him, the recipient had not consented to the

warrantless search and therefore the defendant's message remained "private."

#Fourth Amendment Warrant Required or Not

***State v. Huggett*, 2010 WI App 69, 324 Wis. 2d 786, 783 N.W.2d 675 (2010)**

The defendant had been charged with second-degree murder. At the time of the murder, a police officer seized the defendant's cell phone and took the cell phone of the defendant's girlfriend. The phones allegedly contained text and voice messages from the victim that would have supported self-defense and defense of another. Although the State preserved the text messages, it did not preserve any voicemail. In affirming the dismissal of the charge with prejudice, the appellate court held that the State had created an "expectation of preservation" by taking possession of the phones, that the State had failed in its duty to preserve, and that there was a due process violation as no "comparable evidence" existed. The tone of the victim was important, and neither text messages nor witness testimony was a replacement.

#Preservation and Spoliation

***State v. Lyons*, 417 N.J. Super. 251, 9 A.3d 596 (App. Div. 2010)**

The trial court granted a motion to dismiss the Indictment, concluding that the defendant's "passive conduct" in possessing images of child pornography in a shared folder on a peer-to-peer network were

insufficient to show intent to transfer or distribute the images to other. The Appellate Division reversed in a case of first impression in New Jersey and, in doing so, canvassed the law of other jurisdictions. The defendant was aware that his folder materials were available to others who shared the network and he acted "affirmatively" in installing the network and making these available to others.

#Miscellaneous

***State v. Packingham,* 748 S.E. 2d 146 (N.C. Ct. App. Aug. 20, 2013)**

The defendant was a registered sex offender. He was convicted for maintaining a personal Web page or profile on Facebook. He appealed, arguing that the statute under which he was convicted was unconstitutional. The statute barred an offender from accessing any "commercial social networking Web site where the sex offender knows that the site permits minor children to become members ***." The North Carolina Court of Appeals reversed the conviction: "[W]e conclude that *** [the statute] is not narrowly tailored, is vague, and fails to target the 'evil' it is intended to rectify. Instead, it arbitrarily burdens all registered sex offenders by preventing a wide range of communication and expressive activity unrelated to achieving its purported goal."

#Miscellaneous

#Social Media

***State v. Patino,* 93 A.3d 40 (R.I. 2014)**

The defendant was indicted for the murder of the six-year-old son of his girlfriend. The girlfriend had called 911 from her apartment and reported that her son was unresponsive and not breathing. When the police arrived the defendant was in the apartment. An officer observed four cell phones in the apartment, one of which indicated that it was receiving a message. This led the officer to open the phone and to eventually read an incriminating message. This led to the discovery of additional incriminating messages on three phones. The defendant moved to suppress all evidence derived from the cell phones. The hearing judge granted the motion.

The Rhode Island Supreme Court reversed. The cell phone opened by the officer in the apartment was used exclusively by the girlfriend. "Having already sent the incriminating text messages, which were indeed delivered to *** [the girlfriend's phone], defendant no longer had any control over what became of the messages contained in that phone." Thus, the defendant had no reasonable expectation of privacy in the girlfriend's phone or the messages it contained and lacked standing to challenge the search and seizure. [**NOTE**: There is much more to this decision. This annotation focuses on only one issue].

#Fourth Amendment: Warrant Required on Not

State v. Pittman*, 2009 N.J. Super. LEXIS 2754 (N.J. App. Div. Nov. 4, 2009) (*per curiam)

In this interlocutory appeal, the court affirmed the decision of the trial

court to bar evidence derived from a GPS device installed surreptitiously on the defendant's vehicle. Expert testimony was deemed essential as to the accuracy and trustworthiness of the *particular* GPS device installed on the vehicle, and that testimony was lacking below. Moreover, the State had declined various opportunities to present sufficient proof or make a proffer.

***State v. Polk*, 415 S.W.3d 692 (Mo. Ct. App. 2013)**

The defendant was convicted of rape. On appeal, he challenged, among other things, the prosecutor's comments during trial about the case on Twitter. The trial court rejected the challenge. The Court of Appeals affirmed. It recognized that, "extraneous statements on Twitter or other forms of social media, particularly during the time frame of the trial, can taint the jury and result in reversal of the verdict." However, because the defendant presented no evidence that the jury was, "aware of or influenced by Joyce's [the prosecutor] Twitter comments," it affirmed the denial of the defendant's motion for a new trial.

#Trial Related

#Social Media

***State v. Purtell*, 2014 WI 101, 358 Wis. 2d 212, 851 N.W.2d 417**

In this post-*Riley* decision, the defendant had moved to suppress evidence derived from the warrantless search of his personal computer by a probation officer. The trial court denied the motion. The Court of

Appeals reversed. The Washington Supreme Court reinstated the conviction: "A probation agent's search of a probationer's property satisfies the reasonableness requirement of the Fourth Amendment if the probation agent has 'reasonable grounds' to believe the probationer's property contains contraband. *** The record demonstrates that the probation agent had reasonable grounds to believe Purtell's computer, which Purtell knowingly possessed in violation of the conditions of his probation, contained contraband."

The dissent challenged the majority opinion for failing to distinguish between the seizure of the computer (which was contraband under the defendant's terms of probation) and the subsequent warrantless search of the content of the computer. "By ignoring precedent and suggesting that once property is seized it can be searched, the majority greatly reduces not only the property rights of probationers, but the privacy rights of the millions of people who own cellphones, computers, and similar electronic devices."

#Fourth Amendment Warrant Required or Not

***State v. Reid,* 194 N.J. 386, 945 A.2d 26 (2008)**

The State appealed from the suppression of evidence secured through a defective municipal court subpoena. The defendant had been indicted for computer theft after allegedly accessing a supplier's website and changing her employer's password and shipping address. In a case of first impression, the New Jersey Supreme Court held that Internet subscribers had a reasonable expectation of privacy in their IP addresses under the State Constitution. The court also held that

disclosure of such addresses to third-party service providers did not vitiate the privacy interest and that the address be sought through an *ex parte* grand jury subpoena. Of interest, the court noted: "Should that reality [the existence of websites which reveal service providers but not individual users] change over time, the reasonableness of the expectation of privacy in Internet subscriber information might change as well."

#Miscellaneous

***State v. Riley*, 2013 S.D. 95, 841 N.W.2d 431**

The defendant was convicted by a jury of possession of child pornography. On appeal, he argued that there was insufficient evidence to establish "knowing" possession. The South Dakota Supreme Court affirmed the conviction. The State had no direct evidence. Instead, it relied on circumstantial evidence: "(1) the reinstallation of the operating system, the deletion of numerous other files, and Riley's past employment with IBM together with Riley's knowledge that the police were coming to search his computer, (2) Riley's admission that he used LimeWire and 'glanced at' child pornography, (3) his statement that 'it's gone' in regards to the 79 video files containing child pornography, (4) the text strings suggesting child pornography, and (5) the evidence that he was the only user of the computer at issue on an IP address that was downloading child pornography." The court found this evidence sufficient to support a rational jury verdict.

#Trial Related

State v. Rivera, **No. CA2008-12-308, 2010 WL 339811 (Ohio. Ct. App. Feb. 1, 2010)**

The defendant appealed from his conviction for compelling prostitution. Law enforcement had secured the defendant's cell phone number from minors he had solicited to perform sexual acts and had also secured the defendant's text messages with the minors from his cell phone service provider. Thereafter, a search warrant was issued and the defendant confessed. On appeal, the conviction was affirmed. First, although the SCA had been violated when law enforcement secured the messages by order rather that warrant and had not given the defendant notice, the Act did not provide a suppression remedy for violation of its terms. Moreover, the defendant did not demonstrate a privacy right in the messages.

#Fourth Amendment Warrant Required or Not

State v. Scoles, **214 N.J. 236, 69 A.3d 559 (N.J. Sup. Ct. 2013)**

The defendant was charged with endangering the welfare of a child based on allegations of email transmission of child pornography. He moved to compel discovery after the State refused to provide computer images to his attorney. The trial court denied the motion but entered a protective order that allowed access to the images at a State facility and only within 48 hours of making a request for inspection. The Supreme Court granted leave to appeal: "The discovery issue that we consider *** has become a recurring one as prosecutions involving child pornography have become more frequent." The Supreme Court declined to adopt the "prophylactic controls" of the Adam Walsh Act.

Instead, the court held that, consistent with the "open file" policy of the New Jersey criminal rules, a trial court had authority to issue an order that would allow for greater access within the following framework: (1) defense counsel must request access be afforded within their offices; (2) defense counsel must, at a conference, "demonstrate the ability to comply with the terms of a *** order designed to secure the computer images from intentional and unintentional dissemination ***;"and (3) when access is only allowed at a State facility, "greater access and flexibility must be made available to the defense team as the trial date approaches."

[Note that this decision imposes an ESI-related competency requirement on defense counsel].

#Trial Related

#Discovery Materials

***State v. Scott*, No. A-4147-05T4, 2009 WL 2136273 (N.J. Super. Ct. App. Div. July 20, 2009) (*per curiam*)**

The defendants appealed following their convictions for various crimes. Among other things, they challenged the trial judge's substitution of a juror *after* deliberations began. The substituted juror had conducted Internet research and had shared the results with her fellow jurors. The appellate court vacated and remanded for a new trial, concluding that substitution was inappropriate: The juror did not the New Jersey rule-based "inability to continue" standard for substitution and her conduct tainted the entire jury.

#Trial Related

***State v. Shannon,* 2015 WL 4997091 (N.J. Aug. 19, 2015) (*per curiam*)**

A municipal court judge issued a warrant for the defendant's arrest. Thereafter, the judge vacated the warrant but it remained on a computer database and the defendant was arrested on the warrant. At the time of his arrest narcotics were found in the defendant's vehicle and he was indicted. Relying on a 1987 New Jersey Supreme Court decision that rejected the good faith exception to the Warrant Requirement under the New Jersey Constitution, lower courts determined that the arrest was unlawful and suppressed the evidence. An equally-divided (3-3) Supreme Court affirmed: "The arresting officer's good faith belief that a valid warrant for defendant's arrest was outstanding cannot render an arrest made in the absence of a valid warrant or probable cause constitutionally compliant."

#Fourth Amendment Warrant Required or Not

#Fourth Amendment Good Faith Exception

***State v. Smith*, 124 Ohio St.3d 163, 920 N.E.2d 949 (2009)**

When the defendant was arrested a cell phone was found on his person. Thereafter, without obtaining a warrant, the State searched the information in the cell phone and found incriminating information. The defendant was convicted of drug possession and trafficking after the trial court denied his motion to suppress the information. In a case of

first impression, the Ohio Supreme Court reversed the conviction. The court held that, under the Fourth Amendment, the cell phone was not the equivalent of a closed container that would justify a search incident to arrest, that the defendant had a legitimate expectation of privacy in the cell phone's contents, and that the State should have secured a warrant.

#Fourth Amendment Warrant Required or Not

***State v. Sobczak*, 2013 WI 52, 347 Wis. 2d 724,833 N.W.2d 59 (2013)**

The defendant moved to suppress the fruits of the warrantless search of his home computer. The defendant had invited a guest to stay at his home over a weekend and had given her access to the computer. The guest accessed suspicious files on the computer and invited law enforcement into the defendant's home to view the files. The trial court denied the defendant's motion to suppress. The intermediate appellate court affirmed, as did the Wisconsin Supreme Court, concluding that, under the facts, the guest had authority to consent to the entry and the search.

#Fourth Amendment Warrant Required or Not

***State v. Subdiaz-Osorio*, 2014 WI 87, 357 Wis. 2d 41, 849 N.W.2d 748 (2014)**

In this post-*Riley* decision, the defendant, who was in the United States illegally, fatally stabbed his brother, borrowed a car, and fled the scene.

The police were concerned that the defendant was trying to escape to Mexico and was carrying the murder weapon. Without securing a warrant, the police tracked the defendant through his cell phone location and he was apprehended in Arkansas. The defendant moved to suppress all evidence obtained after his arrest on the grounds that, among other things, the warrantless search of his cell phone location violated the Fourth Amendment. The defendant pled guilty to reckless homicide after hid motion was denied and appealed.

"The court must decide whether law enforcement officers may contact a homicide suspect's cell phone provider to obtain the suspect's cell phone location information without first securing a court order based on probable cause." This question led to *six* separate opinions: "The court is deeply divided on these issues as evidenced by the number of separate filings." To summarize the writings:

(1) One justice, writing the "lead opinion," assumed that" people have a reasonable expectation of privacy in their cell phone location data and that when police track a cell phone's location, they are conducting a search under the Fourth Amendment." However, "the police did have probable cause for a warrant and *** the exigent circumstances of this case created an exception to the warrant requirement." Three justices agreed that exigent circumstances existed.

(2) One justice agreed with the dissent that there was a search within the meaning of the Fourth Amendment and that there were no exigent circumstances, but concluded that the denial of the motion to suppress was harmless error.

(3) One justice concluded that, "absent case-specific exceptions, such as an emergency, a warrant is required for the search of a cell phone's location," but that a good faith exception should be applied and the exclusionary rule should not be applicable.

(4) One justice agreed with the lead opinion that exigent circumstances existed but took issue with its "elaboration" of reasonable expectations of privacy.

(5) One justice cautioned that the Court had received no "briefing or argument on the broader privacy questions that are addressed in the lead opinion or in *Riley.*

(6) In dissent, one justice would hold that there was a "search," that exigent circumstances did not exist, that there was sufficient time to secure a warrant.

[Note: This is a very complicated decision. Justices joined in different opinions and some opinions include discussion of a "subjective" expectation of privacy in the context of terms of service.]

#Fourth Amendment Warrant Required or Not

#Fourth Amendment Exigent Circumstances

#Fourth Amendment Good Faith Exception

***State v. Tate,* 2014 WI 89, 357 Wis. 2d 172, 178, N.W.2d 798 (2014)**

The defendant was sought for a homicide which occurred outside a store in which he had just purchased a cell phone. Law enforcement secured an order for CSLI and, using that information as well as a "stingray," located the defendant in his mother's apartment and

arrested him. The defendant moved to suppress all the evidence, arguing that law enforcement needed a search warrant to track his phone and that the order they secured was not the equivalent of a warrant. The motion was denied, the defendant pled to reckless homicide, and he appealed the denial. The Wisconsin Supreme Court affirmed. "[W]e assume without deciding that: (1) law enforcement's activities constituted a search ***; and (2) because the tracking led law enforcement to discover Tate's location within his mother's home, a warrant was needed. We then conclude that the search was reasonable because it was executed pursuant to a warrant ***. We also conclude that specific statutory authorization was not necessary *** to issue the order *** because the order was supported by probable cause. Nonetheless, the order did comply with the spirit of *** [statutes] which express legislative choices about procedures to employ for warrants and criminal subpoenas." **[Note that the order "functioned as a warrant for our constitutional considerations and as a criminal subpoena in regard to the information obtained from the cell service provider."]**

#Fourth Amendment Warrant Required or Not

#Miscellaneous

***Sublet v. State,* 442 Md. 632 (2015)**

The Maryland Court of Appeals consolidated three cases that involved the same legal issues,

those being the elucidation and implementation of our opinion in *Griffin v. State,* 419 Md. 343, 19 A.3d 425 (2011), in which we addressed the admissibility of a screenshot of a MySpace page, and its application to the authentication of messages allegedly sent through social media networking websites; in *Sublet,* via a Facebook timeline; in *Harris,* on Twitter through 'direct messages' and public 'tweets'; and, in *Monge-Martinez*, through Facebook messages. (footnotes omitted).

The court held that,

in order to authenticate evidence derived from a social media networking website, the trial judge must determine that there is proof from which a reasonable juror could find that the evidence is what the proponent claims it to be. We shall hold in *Sublet* that the trial court did not err in excluding the admission of the four pages of the Facebook conversation. We shall hold in *Harris* that the trial court did not err in admitting the 'direct messages' and 'tweets' in evidence. We shall also hold in *Monge-Martinez* that the trial court did not err in admitting the Facebook messages authored by Monge-Martinez.

The court did make this observation: "We also suggested in *Griffin's* footnote thirteen that a public posting on a social networking page differs from private messages visible to specified individuals with respect to authentication. E-mails and other directed communications, for example, may present a greater opportunity for authentication by circumstantial evidence."

#Trial Materials

#Social Media

***Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012)**

During preparation of the state's case against defendant, the deceased's sister had provided the state with information regarding three MySpace profile pages that she believed defendant was responsible for registering and maintaining. After subpoenaing MySpace.com for the general "subscriber report" associated with each profile account, the state printed out images of each profile page directly from the MySpace.com website, and then marked the profile pages and related content as state's exhibits for trial. Using the deceased's sister as the sponsoring witness for these accounts, and, over defendant's running objection as to the authenticity of the profile pages, the state was permitted to admit into evidence the names, account information, comments and instant messages associated with the profiles, as well as comments and photos posted on the profiles. Defendant appealed his conviction, asserting that the state had failed to prove that he was responsible for creating and maintaining the content of the MySpace pages introduced into evidence. The court of appeals affirmed his conviction, holding that the trial court had not abuse its discretion in admitting evidence from MySpace pages because there was sufficient circumstantial evidence to support a finding that the exhibits were what they purported to be.

#Trial Related

***Wardlaw v. State*, 185 Md. App. 440, 971 A.2d 331 (2009)**

After conviction, the defendant appealed from the denial of his motion for a mistrial based on juror misconduct. One juror had conducted

Internet research on a relevant mental disorder and shared the results of the research with fellow jurors. The appellate court reversed, concluding that the juror had engaged in "egregious misconduct," that a presumption of prejudice arose, and that the trial court's failure to conduct a *voir dire* was an abuse of discretion.

#Trial Related

STATUTES, REGULATIONS, ETC. - FEDERAL

18 U.S.C. Sec. 2517 ("Authorization for disclosure and use on intercepted wire, oral, or electronic communications")

"(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic

communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character."

***

#Miscellaneous

18 U.S.C. Sec. 2703(f) ("Requirement to Preserve Evidence")

Subsection 1 requires a "provider of wire or electronic communication services or a remote computer service, upon the request of a governmental agency," *** [to] take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process."

Subsection 2 provides that such records must be retained for 90 days, "which shall be extended for an additional 90-day period upon a renewed request by the governmental agency."

#Preservation & Spoliation

“The Attorney General’s Guidelines for Domestic FBI Operations”(Sept. 29, 2008)

(“The broad operational areas addressed by these Guidelines are the FBI’s conduct of investigative and intelligence gathering activities, including cooperation and coordination with other components and agencies in such activities, and the intelligence analysis and planning functions of the FBI”).

#Miscellaneous

“Best Practices for Electronic Discovery in Criminal Cases,” W.D. Wash. (adopted Mar. 21, 2013)

(reflecting JETWG Recommendations described below).

#Discovery Materials

Department of Justice Policy Guidance: Domestic Use of Unmanned Aircraft Systems (UAS)

Released on May 24, 2015, this Policy Guidance recognizes that drones have “emerged as a viable law enforcement tool” and sets forth principles to be applied on a “Department [of Justice]-wide” basis.

#Fourth Amendment Warrant Required or Not

Miscellaneous

Department of Justice Policy Guidance: Use of Cell-Site Simulator Technology

Released on September 3, 2015, this Policy Guidance recognizes that the technology "provides valuable assistance in support of important public safety objectives" that must be used "in a manner that is consistent with the requirements and protections of the Constitution, including the Fourth Amendment, and applicable statutory authorities, including the Pen Register Statute." The Policy Guidance requires law enforcement agencies to seek a search warrant pursuant to *Fed. R. Crim. P.* 41 unless there are exigent circumstances or "other circumstances in which *** the law does not require a search warrant and circumstances make obtaining a warrant impracticable."

#Fourth Amendment Exigent Circumstances

#Fourth Amendment Warrant Required or Not

"General Order Regarding Best Practices for Electronic Discovery of Documentary Materials in Criminal Cases,' W.D. Okla. *General Order* 09-05 (Aug. 20, 2009)

(summarizing proposed electronic discovery practices and recognizing that, "[o]pen communications between the government and defense counsel is critical to ensure that discovery is handled and completed in a manner agreeable to all parties").

#Discovery Materials

Letter to Senator Wyden from Internal Revenue Service

This letter, dated November 25, 2015, responded to "a question *** asked during [a] *** hearing about the use of cell-site simulator technology" by the IRS. The letter stated that the IRS would draft a policy that would mirror a DOJ Policy Guidance [*q.v.*] that required a search warrant to be secured "prior to using the technology except in exigent or exceptional circumstances."

#Fourth Amendment Warrant Required or Not

Managing Large Volumes of Discovery in Federal CJA Cases

This Memorandum, authored by James C. Duff, was issued by the Administrative Office of the United States Courts on May 14, 2015. Its purpose was to advise of "services available from the Defender Services' National Litigation Support Team (NLST)" and focused on "Coordinating Discovery Attorneys" and a "Web-hosted Document Review Platform" available through a Defender Services Office contract with AccessData.

#Discovery Materials

Proposed Amendments to Federal Rule of Evidence

On August 16, 2015, the Chair of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States issued a request for public comments on proposed amendments to, among others, *Fed. R. Evid.* 803. (see "Report of the Advisory Committee on

Evidence Rules dated May, 7, 2015). The proposed amendments include:

1. "Abrogation of Rule 803(16), the ancient documents exception to the hearsay rule," because, among other things,

> The ancient documents exception could once have been thought tolerable out of necessity (unavailability of other proof for old disputes) and by the fact that the exception has been so rarely invoked. But given the development and growth of electronically stored information, the exception has become even less justifiable and more subject to abuse. The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to be available and will likely satisfy a reliability-based hearsay exception *** [proposed Committee Note to explain abrogation of 803(16)].

2. "Amendment of Rule 902 to add two subdivisions that would allow authentication of certain electronic evidence by way of certification by a qualified person." As explained by the Committee,

> [t]he first provision would allow self-authentication of machine-generated information, upon a submission of a certification prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, media or file. These proposals are analogous to Rules 902(11) and (12) ***, which permit a foundation witness to establish the authenticity of business records by way of certification.
>
> The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under common law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee has concluded that the types of electronic

evidence covered by the two proposed rules are rarely the subject of a legitimate authentication dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness, incurring expense and inconvenience – and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event.

#Trial Materials

"Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases"

("Department of Justice (DOJ) and Administrative Office of the U.S. Courts (AO) Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG)" (Feb. 2012) (setting out recommendations for "managing ESI discovery in federal criminal cases" in three documents: (1) a "general framework," (2) "technical and more particularized guidance," and (3) a one-page checklist).

#Discovery Materials

"Suggested Practices Regarding Discovery in Complex [Criminal] Cases,"

N.D. Ca. (establishing "protocol of suggested practices regarding discovery in wiretap and other complex, document-intensive cases).

#Discovery Materials

"United States Department of Justice, Prosecuting Computer Crimes" (Computer Crime and Intellectual Property Section Criminal Division: date unknown)

("This manual examines the federal laws that relate to computer crimes. Our focus is on those crimes that use or target computer networks ***").

#Miscellaneous

United States Department of Justice,* Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations *(Computer Crime and Intellectual Property Section Criminal Division: July 2009)

("The purpose of this publication is to provide Federal law enforcement agents and prosecutors with systematic guidance that can help them understand the legal issues that arise when they seek electronic evidence in criminal investigations").

#Miscellaneous

STATUTES, REGULATIONS, ETC. - STATE

***R*. 3:9-1(b) ("Meet and Confer Requirement; Plea Offer")**

New Jersey Rules Governing Criminal Practice (requiring prosecutor and defense counsel to, "confer and attempt to reach agreement on any

discovery issues, including any issues pertaining to discovery provided through the use of CD, DVD, e-mail, internet or other electronic means").

#Discovery Materials

_R._ 13-5(c) ("Special Service Charge for Electronic Records")

New Jersey Rules Governing Criminal Practice ("If defense counsel requests an electronic record ***, the prosecutor may charge, in addition to the actual cost of duplication, a special charge ***.")

#Discovery Materials

Attorney General Law Enforcement Directive No. 2015-1

The subject of this Directive, issued by the Acting Attorney General of New Jersey on July 28, 2015, is "Law Enforcement Directive Regarding Policy Body Worn Cameras (BWCs) and Stored BWC Recording." It is intended to "provide guidance to police departments on how to make the best possible use of electronic recording technology."

#Discovery Materials

#Preservation and Spoliation

#Miscellaneous

Minnesota S.F. No. 1740

(approved by Governor May 14, 2014) (among other things, requiring that, "[a]ny new smart phone manufactured on or after July 1, 2015, sold or purchased in Minnesota must be equipped with preloaded antitheft functionality or be capable of downloading that functionality. The functionality must be available to purchasers at no cost").

(also providing that, "[w]henever a law enforcement official *** has probable cause to believe that a wireless communications device in the possession of a wireless communications device dealer is stolen or is evidence of a crime and notifies the dealer not to see the item, the dealer shall not (1) process or sell the item, or (2) remove or allow its removal from the premises. This investigative hold must be confirmed in writing *** within 72 hours and will remain in effect for 30 days ***").

#Miscellaneous

Missouri Constitutional Amendment No. 9, amends Section 15 of Article I

"That the people shall be secure in their persons, papers, homes [and], effects, **and electronic communications and data,** from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, **or access electronic data or communication,** shall issue without describing the place to be searched, or the person or thing to be seized, **or the data or communication to be accessed,** as

nearly as may be; nor without probable cause, supported by written oath or affirmation." (added text in highlight) (approved Aug. 5, 2014).

#Miscellaneous

"Policy and Procedure Information and Updates: Public Recordings,"

Memphis Police Dept. **(**Dec. 17, 2013)(introducing policy and procedure related to public's "right to video record, photograph, and/or audio record MPD members").

#Miscellaneous

SB 178, enacted into law Oct. 8, 2015

This California legislation adds a new Chapter 3.6 (commencing with Section 1546) to Title 12 of Part 2 of the Penal Code ("the California Electronic Communications Privacy Act"). Generally, Section 1546 requires the government secure a search warrant to "access electronic device information by means of physical interaction or electronic communication." It also provides, among other things, that the Government must notify the target of an investigation about the information covered by a search warrant, that service providers must verify authenticity of information produced, and that service providers may voluntarily disclose communications unless otherwise prohibited by law.

#Fourth Amendment Warrant Required or Not

#Trial-Related

#Miscellaneous

TEXAS HB2268, Section 5A

(enacted into law June 14, 2013) (requiring issuance of search warrant, supported by finding of probable cause, when law enforcement seeks, "electronic customer data held in electronic storage, including the content of and records and other information related to a wire communication or electronic communication held in electronic storage, by the provider of an electronic communications service or a provider of a remote computing service ***, regardless of whether the customer data is held in this state or in a location in another state").

#Fourth Amendment Warrant Required or Not

PUBLICATIONS

C. Doyle, *The Federal Grand Jury* (CRS: May 7, 2015)

#Miscellanous

Criminal E-Discovery: A Pocket Guide for Judges (FJC: 2015)

This Pocket Guide, issued by the Federal Judicial Center in 2015, was developed to "help judges manage complex e-discovery in criminal cases." It is available at fjc.gov.

#Discovery Materials

Miscellaneous

E.C. Liu, A. Nolan & R.M. Thompson III, *Overview of Constitutional Challenges to NSA Collection Activities* (CRS: May 21, 2015)

#Fourth Amendment Warrant Required or Not

Massachusetts Evidence Guide for First Responders (Mass. Digital Evid. Consortium: Jan. 2013)
#Fourth Amendment Warrant Required or Not

Massachusetts Digital Evidence Guide, Office of the Attorney General (Cyber Crime Division: June 9, 2015)

#Fourth Amendment Warrant Required or Not

Trial Materials

*J.P. Murphy & Louisa K. Marion, "*Digital Privacy and E-Discovery in Government Investigations and Criminal Litigation*," Chapter 6, The State of Criminal Justice 2015 (ABA: 2015)*

#Fourth Amendment Warrant Required or Not

ARTICLES

K.S. Bankston & A. Soltani, "Tiny Constables and the Cost of Surveillance: Making Cents out of United States v. Jones, *YLJO Essay* (Jan. 9, 2014)

#Fourth Amendment Warrant Required or Not

"Best Practices for Victim Response and Reporting of Cyber Incidents," Cybersecurity Unit, Computer Crime & Intellectual Property Section, U.S. Dept. of Justice (Version 1.0) (Apr. 2015)

#Miscellaneous

D. Barrett, "U.S. Urges Bodycams for Local Police, but Nixes Them on Federal Teams," *Wall St. J.* A3 (Nov. 12, 2015)

#Discovery Materials

#Miscellaneous

D.R. Beneman & D.L. Elm, "Extraterritorial Search Warrants Rule Change," Criminal Justice 9 (Winter 2014)

#Fourth Amendment Warrant Required or Not

G. Blum & B. Wittes, "New Laws for New Threats Like Drones and Bioterrorism," Wall St. J. C3 (Apr. 18-19, 2015)

#Miscellaneous

T.E. Brostoff, "Constitutional and Practical Dimensions of ESI in Federal and State Criminal Actions," 13 *DDEE* 448 (Aug. 29, 2013)

(reporting on "discussion of topics including law enforcement's expanding use of electronic devices, the admissibility of electronic evidence, and tools and best practices for practitioners and jurists").

#Miscellaneous

T.E. Brostoff, "ESI in the Criminal Justice System Webinar Discusses Pre- and Post-Indictment Issues," 14 DDEE 152 (2014)

(reporting on two-part webinar that discussed various issues related to ESI in the investigation and prosecution of crimes).

#Fourth Amendment Ex Ante Conditions

#Fourth Amendment Particularity Requirement

#Fourth Amendment Warrant Required or Not

#Discovery Materials

#Miscellaneous

T. Brostoff, "From Quon to Riley and Beyond: Criminal Law, eDiscovery and New Trends," 15 DDEE 527 (2015)

#Fourth Amendment Warrant Required or Not

#Miscellaneous

T. E. Brostoff, "Riley's Implications on Future Jurisprudence and Fourth Amendment Discussed in Webinar," 14 DDEE 399 (2014)

(reporting on webinar that addressed *Riley v. California* and other recent decisions and how courts might approach constitutional issues post-*Riley).*

#Fourth Amendment Warrant Required or Not

B. Canis & D.R. Peterman, "Black Boxes" in Passenger Vehicles: Privacy Implications (CRS: July 21, 2014)

(discussing policy implications of National Highway Traffic Safety Administration to make event data recorders mandatory on all new passenger vehicles sold in the United States).
#Miscellaneous

K. Chayka, "Somebody's Watching: In the Age of Biometric Surveillance There is No Place to Hide,"* Newsweek *28 (Apr. 25, 2014)

("Today's laws don't protect Americans from having their webcams scanned for facial data").
#Miscellaneous

Z. Elinson, "More Officers Wearing Body Cameras,"* Wall St. J. *(Aug. 15, 2014)

(reporting that, "[m]ore police departments are outfitting policemen with wearable cameras that tape what officers see as they do their job, providing a record in the aftermath of incidents like the one in Ferguson, Mo. ***").
#Miscellaneous

D.E. Elm & S. Broderick, "Third-Party Case Services and Confidentiality,"

Criminal Justice *15 (Spring 2014)*

(commenting on growing trend to use third-party vendors and addressing need to maintain confidentiality when doing so).
#Miscellaneous

J.A. Engel, "Rethinking the Application of the Fifth Amendment to Passwords and Encryption in the Age of Cloud Computing," *Whittier L. Rev.*, Vol. 33, No. 3 (Summer 2012)

(addressing whether Fifth Amendment prevents government from

forcing witness to provide password or encryption key).

#Fifth Amendment Self-Incrimination

C. Fariver, "FBI Would Rather Prosecutors Drop Cases Than Disclose Stingray Details," *Ars Technica* (Apr. 7, 2015)

#Fourth Amendment Warrant Required or Not

#Discovery Materials

C. Friedersdorf, "The NYPD is Using Mobile X-Ray Vans to Spy on Unknown Targets," *The Atlantic* (posted Oct. 19, 2015)

#Fourth Amendment Warrant Required or Not

#Miscellaneous

D.K. Gelb, "Defending a Criminal Case from the Ground to the Cloud," 27 *Criminal Justice,* No. 2 (2012)

(proposing guidelines for defense counsel to suppress or admit ESI at trial).

#Trial Related

D.K. Gelb & D.B. Garrie, "A Dilemma for Criminal Defense Attorneys: The Benefit of Pursing ESI Versus the Detriment of Implicating the Client," 11 *DDEE* 339 (2011)

(addressing challenges faced by defense counsel in investigating role of ESI in criminal matters).

#Miscellaneous

A.D. Goldsmith, "Trends – Or Lack Thereof – In Criminal E-Discovery: A Survey of Recent Case Law," 59 United States Attorneys' Bulletin 2 (2011)

(noting that, unlike civil litigation, "a coherent body of case law on appropriate collection, management, and disclosure of ESI has yet to emerge in the criminal context").

#Miscellaneous

A.D. Goldsmith & J. Haried, "The New Criminal ESI Discovery Protocol: What Prosecutors Need to Know," 60 UNITED STATES ATTORNEYS BULLETIN 5 (Sept. 2012)

#Discovery Materials

#Trial Materials

L.A. Gordon, "A Byte Out of Crime," 99 *ABA J.* ___ (Sept. 2013) (discussing constitutional concerns arising from "predictive policing")

#Miscellaneous

J. Gruenspecht, "'Reasonable' Grand Jury Subpoenas: Asking for Information in the Age of Big Data," 24 *Harvard J. L. & Tech.* 543 (2011)

(discussing constitutional and statutory limits on the scope of subpoenas and arguing that, "increasing use of digital storage technologies challenges even those limited boundaries").

#Miscellaneous

R.J. Hedges, "Sentencing Guidelines, Corporate Governance and Information Management," 14 DDEE 238 (2014)

(discussing relationship between corporate governance and the Sentencing Guidelines).
#Miscellaneous

E. H. Holder, Jr., "In the Digital Age, Ensuring that the Department Does Justice," 41 Geo. L.J. Ann. Rev. Crim. Proc. iii (2012)

#Fourth Amendment Warrant Required or Not

#Miscellaneous

R.F. Kennedy, "Sequestration and the Impact on Access to Justice – a Growing Problem," 55 *NYSBA State Bar News* 22 (Sept./Oct. 2013)

(noting impact of sequestration in 2013 on federal courts and Legal Services Corporation).

#Trial Related

O. Kerr, "A Revised Approach to the Fifth Amendment and Obtaining Passwords," *Washington Post* (posted Sept. 25, 2015)

#Fifth Amendment Self-Incrimination

O. Kerr, "Eleventh Circuit Deepens the Circuit Split on Applying the Private Search Doctrine to Computers," *Washington Post* (posted Dec. 2, 2015)

#Fourth Amendment Warrant Required or Not

O. Kerr, "Fourth Circuit Adopts Mosaic Theory, Holds that Obtaining 'Extended' Cell-Site Records Requires a Warrant," Washington Post (the Volokh Conspiracy) (posted Aug. 5, 2015)

#Fourth Amendment Good Faith Exception

#Fourth Amendment Warrant Required or Not

J. Kosseff, "Should Tech Companies Be Subject to the Fourth Amendment," *Crunch Network* (posted Dec. 13, 2015)

#Fourth Amendment Warrant Required or Not

J. Larson & J. Angwin, "Fact-Checking the Encryption Debate," *ProPublica* (posted Dec. 15, 2015)

#Warrant Required or Not

#Miscellaneous

F. Manjoo, "Police Cameras Can Shed Light, but Raise Private Concerns,"* New York Times *(Aug. 20, 2014)

(reporting that, "[t]he crucial questions of when police should begin recording their work and who gets to decide which encounters should be recorded are still being worked out").
#Miscellaneous

J.P. Murphy & A. Fontecilla, "Social Media Evidence in Criminal Proceedings: A Frontier of New Legal Issues," *Richmond J. of Law and Tech.,* Vol. 19, No. 3 (2013)

(arguing that social media evidence raises unique legal challenges in criminal proceedings).

#Trial Related

J.P. Murphy & L.K. Marion, "Riley v. California: The Dawn of a New Age of Digital Privacy," 14 DDEE 345 (2014)

("Recognizing the revolutionary nature of modern technologies—and it is clear that the [Supreme] Court's analysis extends well beyond cell phones-- the Court affirmed that mobile media is just *different.* With *Riley,* the Court ushers in a new age of digital privacy").

#Fourth Amendment Warrant Required or Not

#Miscellaneous

"New Contact System Makes Sure Offenders Are Never Out of Reach," Third Branch News (Feb. 11, 2014)

(reporting on use of "web-based Client Electronic Notification System (CENS) that will help officers maintain that contact [with individuals on pretrial release or on probation] and safeguard the community").

#Miscellaneous

J. Palazzolo, "Defense Attorneys Demand Closer Look at Software Used to Detect Crime-Scene DNA," *Wall St. J.* A3 (Nov. 11, 2015)

#Discovery Materials

#Trial Related

J. Palazzolo, "NSA Phone-Data Collection Program Set for Legal Challenge," Wall St. J. A2 (Sept. 2, 2014)

(reporting on appeals from two district court decisions on constitutionality of NSA surveillance).

#Fourth Amendment Warrant Required or Not

Peterson & E. Nakashima, "Obama Administration Explored Ways to Bypass Smartphone Encryption," *Washington Post* (posted Sept. 24, 2015)

#Fourth Amendment Warrant Required or Not

#Miscellaneous

K. Robinson, "Judges Try to Read Tea Leaves; What's Next for Technology at High Court?" 15 DDEE 308 (2015)

#Fourth Amendment Warrant Required or Not

P. Shallwani, "Tablets to Help Fight Crime," Wall St. J. A17 (June 27, 2014)

(reporting on "potential of putting NYPD databases at officers' fingertips").

#Miscellaneous

R.M. Thompson, The Fourth Amendment Third-Party Doctrine (CRS: June 5, 2014)

("[T]his report explores the third-party doctrine, including its historical background, its legal and practical underpinnings, and its present and potential future applications").

#Fourth Amendment Warrant Required or Not

J. Valentino-Devries, "Police Snap Up Cheap Cellphone Trackers," WALL ST. J. (Aug. 19, 2015, 12:57 PM), http://www.wsj.com/articles/police-snap-up-cheap-cellphone-trackers-1439933271.

#Fourth Amendment Warrant Required or Not

E. Volokh, "What Happens If You Take the Fifth in a Civil Case? An Important California Case Law Correction," Washington Post (the Volokh Conspiracy) (posted Aug. 30, 2015)

#Fifth Amendment

"With LENS, Offender Data Quickly Reaches Officers on Beat," *Third Branch News* (Jan. 16, 2014)

#Miscellaneous

END OF DOCUMENT

Representative Federal and State Judicial Decisions and Supplementary Materials Involving Protective Orders, Confidentiality and Public Access in Civil and Criminal Matters

May 2016

Ronald J. Hedges, Editor
Trevor J. Satnick, Assistant Editor

© Ronald J. Hedges

Reprint permission granted to all state and federal courts, government agencies, and non-profit continuing legal education programs

NOTE TO THE READER*

In 2007, *The Sedona Guidelines Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*** was published as a project of The Sedona Conference Working Group on Protective Orders, Confidentiality & Public Access (WG2). The intent of the *Guidelines* was to recognize the relationship—and tension—between the legitimate confidentiality needs of parties and the "right of access" derived from the First Amendment, the common law, and state and federal statutes and regulations. To do so, the *Guidelines* cited to, among other things, existing decisions. The *Guidelines* were supplemented by a Spring 2014 Digest. This compilation incorporates that Digest as well as new decisions and materials.

The compilation is both over- and under-inclusive. The decisions and materials are *over-inclusive* in that some go beyond the "four corners" of the *Guidelines* and address privacy in other contexts, such as criminal and broad privacy-related matters. The decisions and materials are *under-inclusive* as the compilation is not exhaustive.

With these caveats, we hope that the reader will benefit from what has been selected. Feel free to suggest others by sending them to the Editor at r_hedges@live.com.

*Neither this compilation nor the Spring 2014 Digest are official publications of The Sedona Conference.

**The *Sedona Guidelines Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases* may be downloaded at The Sedona Conference website.

Tags

#Court Proceedings

#Discovery Materials

#Dockets & Judicial Records

#Freedom of Information Act

#Miscellaneous

#Pleadings & Orders

#Settlement

#State FOIA

TABLE OF CONTENTS

United States Supreme Court **1**

FCC v. AT&T *1*
Maracich v. Spears, ... *1*
McBurney v. Young *1*
Milner v. Department of the Navy. *2*

Federal Decisions **3**

ACLU v. FBI. *3*
In re Anonymous Online Speakers, 611 F.3d 653 (9th Cir. 2010), opinion withdrawn and superseded by In re Anonymous Online Speakers. *3*
Apple Inc.v. Samsung Elec. Co.. ..... *4*
In re Application of the United States of America for an Order Pursuant to 18 U.S.C. Section 2703(D *5*
In re ATM Fee Antitrust Litig. *6*
Beavers-Gabriel v. Medtronic, Inc. *6*
Bernstein v. Bernstein Litowitz Berger & Grossman LLP. *6*
Best v. County of Cumberland. *7*
Branhaven, LLC v. Beeftek, Inc. *7*
Brennan Ctr. for Justice v. DOJ. *7*
Carlson v. United States. *8*
Carnegie Mellon Univ. v. Marvell Tech. Grp. *8*
Center for Auto Safety v. Chrysler Goup *9*
Center for Const. Rights v. Lind. *9*
Center for Effective Gov't v. Department of State *10*
Century Indemnity Co. v. AXA Belgium *10*
Citizens for Responsibility and Ethics in Washington v. Federal Election Comm'n *10*
Clearly Food & Beverage Co. v. Top Shelf Beverages, Inc. *11*
Constand v. Cosby *11*
Containment Tech. Grp. v. American Soc'y of Health Sys. Pharmacists *12*
Courthouse News Serv. v. Planet *12*
Delaware Coalition for Open Gov't, Inc. v. Strine *13*
Doe v. Megless, ... *13*
Electronic Privacy Info. Ctr. v. Department of Homeland Security. *13*
Estate of Carlock v. Williamson *14*
Ferron v. Search Cactus, LLC *14*
Flynt v. Lombardi *15*
FTC v. Abbvie Prod. LLC, ... *15*
In re Gen. Motors LLC Ignition Switch Litig. *16*
Gerlich v. DOJ. *16*

Glock v. Glock. 16
In re Google, Inc. 17
GPNE Corp. v. Apple Inc. 18
In re Grand Jury Subpoenas. 18
Green v. Cosby. 19
Hinklin Engineering, L.C. v. Bartell 19
International Counsel Bureau v. Deptartment of Defense 19
Jacobs v. Las Vegas Sands Corp. 20
John B. v. Goetz. 20
Laugher v. New York 21
Leigh v. Salazar 21
In re Los Angeles Times Comm'ns LLC. 22
Marceaux v. Lafayette City-Parish Consol. Gov't. 22
Martin v. Hearst Corp. 22
McKay v. Federspeil 23
Mendez v. City of Gardena 23
Menifee v. Deptartment of the Interior 24
In re Midland Nat. Life Ins. Co. Annuity Sales Practices Litigation 24
Moffat v. DOJ. 25
Mohideen v. Calnet, Inc. 26
Moore v. CIA. 26
Newsday LLC v. County of Nassau. 26
New York Times Co. v. Department of Homeland Security 28
New York Times Co. v. U.S. Dep't of Justice 28
Nichols v. Sivilli 29
Nieman v. Versuslaw, Inc. 29
Oklahoma Observer v. Patton 29
Opis Mgmt. Re. LLC v. Sec'y Fla. Agency for Health Care Admin. 30
Opperman v. Allstate New Jersey Ins. Co. 30
Paige v. Drug Enforcement Admin. 30
Perfect Barrier LLC v. Woodsmart Solutions Inc. 31
Perry v. Brown 31
In re Posco 32
Prison Legal News v. Executive Office for U.S. Att'ys 32
Rocky Mountain Bank v. Google, Inc. 33
Sanmedical Inter'l v. Amazon.com Inc. 33
Sanofi-Aventis U.S. LLC v. Breckenridge Pharm., Inc. 34
Smith & Fuller, PA v. Cooper Tire & Rubber Co 34
In re Special Proceeding 34
Suarez Corp. Ind. v. Earthwise Techs. Inc. 35
In re Swift Energy Co. 35
United States v. Bonds 36

United States v. Business of Custer Battlefield Museum & Store Located at Interstate 90, Exit 514, S. of Billings, Mont 36
United States v. Christie 36
United States v. Dougherty 37
United States ex rel. Holmes v. Northrup Grumman Corp. 37
United States ex rel. Steel Erectors, Inc. v. AIM Steel Internat'l, Inc. 38
United States v. HSBC Bank USA 38
United States v. Kravetz 39
United States ex rel. Martin v. Life Care Ctrs. of Am., Inc. 39
United States v. Jenkins 40
United States v. Swartz 40
Walgren Company v. Schlage Lock Co. 41
In re The Wall St. Journal 41
Williams & Connolly v. SEC 41
Wiles v. Ascom Transp. System, Inc. 42
World Pub. Co. v. USDOJ 42
Yonemoto v. Department of Veterans Affairs, ... 43

State Decisions **44**

ACLU of Iowa v. Records Custodian, ... 44
Amis v. Greenberg Traurig LLP 44
Apple, Inc. v. Superior Court 44
Arpaio v. Davis, 221 Ariz. 45
Bainbridge Island Police Guild v. City of Puyallup. 45
Bennett v. Smith Bundy Berman Britton, PS 46
Billings Gazette v. City of Billings 46
Casa W, LLC v. Superior Court 47
State ex rel. The Cincinnati Enquirer v. Hunter 47
City of Champaign v. Madigan. 48
City of Dallas v. Abbott 48
City of Riverdale v. Diercks. 49
Commonwealth v. Pon 49
Court of Common Pleas of Lackawanna Cnty. v. Pennsylvania Office of Open Records 50
Denver Post Corp. v. Ritter 50
Drinker Biddle & Reath LLP v. Department of Law & Pub. Safety 50
In re Enforcement of a Subpoena. 51
Freedom Found. v. Gregoire. 51
Galloway v. Town of Hartford 51
Globe Newspaper Co. v. Superior Court for the County of Norfolk (In re Globe Newspaper Co., Inc.) 53
Gregerson v. Hennepin Cty. 53
In re Indiana Newspapers Inc. 54
Judicial Watch, Inc. v. City of Phoenix 54

Juneau County Star-Times v. Juneau County. 55
In re Jury Questionnaires 55
KPNX-TV Channel 12 v. Stephens 55
KSTP-TV v. Ramsey County. 56
Lawson v. Office of the Att'y Gen. 56
Maese v. Tooele County 57
In re Maine Today Media Inc. 57
McLeod v. Parnell 58
McNair v. Nat'l Collegiate Athletic Ass'n 58
Media Publishing Grp., LLC v. Stat 59
Montenegro v. City of Dover. 59
Nissen v. Pierce Cty. 59
N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst 60
Paff v. Borough of Chatham,. 60
Palm Beach Newspapers, LLC v. State 61
People v. Harris 61
People v. Holmes 61
People v. Sledge 62
Rapid City Journal v. Delaney 62
Reno Newspapers, Inc. v. Gibbons 62
Republican Party of New Mexico v. New Mexico Taxation & Revenue Dept. 63
Rueger v. Natural Res. Bd. 63
Rutland Herald v. Vermont State Police 64
Sander v. State Bar 64
Schroeder v. Utah Attorney Gen.'s Office 65
Shane v. Parish of Jefferson 65
Sierra Club v. Superior Court 65
Smith v. Township of Richmond 66
Sorenson v. Superior Court. 66
State ex rel. Missouri Lawyers Media, LLC v. Disciplinary Hearing Panel Number DHP-11-029. 66
State ex rel. Schiffbauer v. Banaszak 67
State in Interest of Doe 67
In re Subpoena Duces Tecum on Custodian of Records 68
Union Leader Corp. v. New Hampshire Ret. Sys. 68
Vares-Ebert v. Kelberg. 69
Ward & Lee, P.L.C. v. City of Claremore 69
West v. Everett 69
Williams v. MLB Network, Inc. 70

Statutes, Regulations, Etc.—Federal **71**

Privacy Protection for Filings Made with the Court *71*
Public Access to Documents and Proceedings *71*
Public Access to Documents and Proceedings *71*
Filings Under Seal; Disposal of Sealed Materials *71*
Procedure 8: Confidentiality Voluntary E-Mediation Program of the United States District Court for the Northern District of Illinois *71*
Policy with Regard to Open Judicial Proceedings *71*
Guidelines on Citing to, Capturing, and Maintaining Internet Resources in Judicial Opinions/Using Hyperlinks in Judicial Opinions *72*

Statutes, Regulations, Etc.—State **73**

Colorado Supreme Court, Court of Appeals, Office of the State Court Administration launch Twitter accounts @CoSupreme Court, @CoCourtAppeals and CoCourts now on Twitter *73*
Delivering Our Message: Court Communication Plan for the Judicial Branch of Florida January 2016 . *73*
Guidelines for Use of Laptops by the Media. *73*
LPD Bulletin 14-0193, "Video/Audio Recording Information," *73*
Press Release, New York State Unified Court System, "Chief Judge Announces Amended Rules Addressing Audio-Visual Coverage of Court Proceedings" *73*
Public Access to Documents Filed with the Court in Civil Actions *74*
Public Access to Judicial Branch Records *74*
Opinion 239, Georgia Judicial Qualifications Comm'n *74*
Access to Court and ADLRO [Administrative Driver's License Revocation Office] *74*
Rules for Expanded Media Coverage, Iowa Court Rules, Ch. 25 ..... *75*
Metadata Retention Guidance *75*
Oklahoma Open Records Act, Definitions *75*
Destruction, Sealing, and Redaction of Court Records, Wash. State Court General Rule 15 ..... *75*
Section 23-1-240, South Carolina Code of Laws *75*

Articles **76**

S.C. Bennett, Is America Ready for the Right to be Forgotten. *76*
R. Bradway, Metadata as a Public Record: What It Means, What It Does. *76*
D.S. Clancy, C.A. Lisy & B.J. Brodeur, Mending the Wall: A Call for a Presumption of Confidentiality in the Federal Civil Rules *76*
Conference of State Court Administrators, 2012-2013 Policy Paper: To Protect and Preserve: Standards for Maintaining and Managing 21st Century Court Records *76*
S. Gidiere & T. Simpson, Federal Information Access Gets an Upgrade *76*
R.J. Hedges, Hiding the Costs of eDiscovery from the Public: What's the Rhyme or Reason? *77*
G. Hurley, Body-Worn Cameras and the Courts *77*
K.B. Kaplan, Will Virtual Courts Create Courthouse Relics? *77*
M. Kosciejew, Digital Vellum and Other Cures for Bit Rot, ... *77*

A. Liptak, Prosecutors Can't Keep a Secret in Case on Steroid Use *77*
Media Freedom & Information Access Clinic, Police Body Cam Footage: Just another Public Record ... *77*
N.S. Marder, Judicial Transparency in the Twenty-First Century *78*
N. Raaen, Order in the Courts! RM Principles for the Judiciary *78*
R.T. Reagan, Confidential Discovery: A Pocket Guide on Protective Orders *78*
Restored Historic Court Records are Returned to Virgin Islands *78*
S. M. Smith, Kudzu in the Courthouse: Judgments Made in the Shade *78*
H.S. Temple, Are Digitalization and Budget Cuts Compromising History? *79*
J. Valentino-DeVries & D. Yadron, Open Secret About Google's Surveillance Case No Longer Secret *79*
United States Courts, Court Libraries Adapt to Deep Cuts, Changing Technology *79*
E. Volokh, An Injunction against Speech Harms Not Just the Speakers but Also the Listeners *79*

Sample Protective Orders **80**

In the Matter of Applications of Deutsche Telekom AG, T-Mobile USA, Inc., and MetroPCS Communications, Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations. *80*
The Sedona Conference® International Principles on Discovery/Disclosure/Data Protection *80*

United States Supreme Court

FCC v. AT&T, 131 S. Ct. 1177 (2011).

Underlying this FOIA action was an investigation of AT&T by the FCC. In the course of the investigation, which was resolved by consent decree, AT&T produced documents. A trade association made a FOIA request for certain of these documents. AT&T objected to the request, arguing that the documents had been "compiled for law enforcement purposes" and that disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy" under Exemption 7C, 5 U.S.C. Sec. 551(b)(7)(C). The FCC rejected that argument. The Third Circuit Court of Appeals reversed, concluding that Exemption 7C extended to the "personal privacy" of corporations. The Supreme Court reversed: "The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal property does not extend to corporations. We trust that AT&T will not take it personally."

#Freedom of Information Act

Maracich v. Spears, 133 S. Ct. 2191 (2013).

The federal Driver's Privacy Protection Act prohibits the disclosure of personal information contained in the records of State motor vehicle departments unless disclosure is permitted under one or more of fourteen subsections, one of which permits disclosure for use "in connection with" judicial proceedings, including "investigation in anticipation of litigation." The respondent South Carolina attorneys obtained the names and addresses of thousands of individuals from that State's motor vehicle department and used that information to solicit the individuals for a law suit. The attorneys were sued for violation of the Act by using bulk information without the individuals' consent. The Court of Appeals held that the solicitations fell within the permitted disclosure. Interpreting the text of the Act, the Supreme Court reversed, holding that the solicitation of prospective clients was neither a use "in connection with" litigation nor an "investigation in anticipation of litigation."

#Miscellaneous

McBurney v. Young, 133 S. Ct. 1709 (2013).

The Virginia Freedom of Information Act provides that "all public records shall be open for inspection and copying by any citizens of the Commonwealth" but grants no such rights to non-Virginians. The courts below held that there was no constitutional infirmity in this distinction, although the Third Circuit Court of Appeals had held that an analogous Delaware statute was unconstitutional. The Supreme Court affirmed the lower courts, holding that "[t]he challenged provision of the State FOIA does not violate the Privileges and Immunities Clause simply because

it has the incidental effect of preventing citizens of other States from making a profit by trading on information contained in state records." The Court also rejected the argument that the challenged provision abridged the right to own and transfer property in Virginia: "Requiring noncitizens to conduct a few minutes of Internet research in lieu of using a relatively cumbersome state FOIA process cannot be said to impose any significant burden ***." The Court further rejected the argument that the challenged provision impermissibly burdened access to Virginia courts, noting that available discovery mechanisms were sufficient and that "Virginia law gives citizens and noncitizens alike access to judicial records." Finally, the Court rejected a challenge based on the "dormant Commerce Clause."

#Miscellaneous

***Milner v. Department of the Navy*, 131 S. Ct. 1259 (2011).**

The Navy denied a FOIA request made by a Puget Sound resident who sought data and maps related to munitions storage in the Sound, relying on what was commonly called the "High 2 Exemption" [of Exemption 2, 5 U.S.C. § 552(b)(2)]. The district and the Court of Appeals for the Ninth Circuit both upheld the Navy's invocation of the "High 2 Exemption," and affirmed the entry of summary judgment in favor of the Navy. The Ninth Circuit Court of Appeals concluded that the materials qualified for a "High 2 Exemption" because their disclosure "'would risk circumvention of the law' by 'pointing out the best targets for those bent on wreaking havoc'—for example, terrorist who wished to hit the most damaging target.'" The Supreme Court granted certiorari, citing "the Circuit split respecting Exemption 2's meaning," and reversed. The Supreme Court held that the plain meaning of the phrase "personnel rules and practices," as used in the statute, "encompasses only records relating to issues of employee relations and human resources." The Supreme Court also rejected the "High 2 – Low 2" distinction made by some of lower courts when interpreting Exemption 2. Suggesting that the Navy could ask Congress to amend FOIA, the Supreme Court remanded the case for the Court of Appeals to determine the applicability of other FOIA exemptions to the data and maps.

#Freedom of Information Act

Federal Decisions

ACLU v. FBI, 733 F.3d 526 (3d Cir. 2013).

In this FOIA action, the ACLU challenged the district court's ruling that allowed the FBI to withhold certain "racial/ethnic data" as well as the district court's reliance on an *in camera* declaration submitted by the FBI. The Court of Appeals affirmed: (1) FOIA Exemption 7A, which authorizes the withholding of records, "to the extent that the production *** could reasonably be expected to interfere with [law] enforcement proceedings," furnished the rule of decision, (2) the declaration provided an adequate description of the risk of harm should the data be disclosed, (3) "the harm from disclosure lies in revealing, indirectly, the FBI's targeting preferences and investigative techniques—not in revealing demographic information that is already public," and (4) the district court acted within its discretion to conduct an *in camera* review rather than adopt, as the ACLU requested, a "Glomar-like" procedure. "[A]n *in camera* procedure provides for *more* meaningful judicial review than does the 'Glomar-like' method of adjudicating '[o]pen ended hypothetical questions,' which 'are not well suited to the litigation process.'"

#Freedom of Information Act

In re Anonymous Online Speakers, 611 F.3d 653 (9th Cir. 2010), *opinion withdrawn and superseded* by *In re Anonymous Online Speakers* 661 F.3d 1168 (9th Cir. 2011).

In this long-running business dispute, a multilevel marketing corporation sued the provider of business training materials for tortious interference with its existing contracts and with advantageous business relations. The plaintiff alleged that the defendant orchestrated an Internet smear campaign via anonymous postings and videos disparaging the corporation and its business practices. As part of the discovery process, the corporation sought testimony from an employee of the provider, regarding the identity of five anonymous online speakers who allegedly made defamatory comments about the corporation. The employee refused to identify the anonymous speakers on First Amendment grounds. The district court ordered the provider to disclose the identity of three of five nonparty anonymous speakers. Under the All Writs Act, the speakers sought a writ of mandamus directing the district court to vacate its order requiring the disclosure of their identities. The corporation cross-petitioned for mandamus relief, asking the court to direct the provider's employee to testify regarding the identity of the two remaining anonymous speakers. The Court of Appeals originally ruled on the petition for *writ of mandamus* in July 2010, but the court withdrew its opinion and issued a new one in January 2011. The later opinion denied both petitions for writs of mandamus, ultimately leaving the district court decision untouched.

#Discovery Materials

Apple Inc. v. Samsung Elec. Co., 727 F.3d 1214 (Fed. Cir. 2013).

In this ongoing patent infringement action, the parties took interlocutory appeals from orders of the district court that denied their requests to seal confidential exhibits attached to pre- and post-trial motions. As the Court of Appeals noted, "[t]hese appeals are unique in that neither the appellant *** nor the cross-appellant *** opposes the other party's requested relief." Opposition came from a coalition of news organizations.

The Court of Appeals reversed the orders: (1) The coalition was *denied* leave to intervene but was *granted* leave to file an *amicus* brief, as was another media organization, (2) the court had jurisdiction under the collateral order doctrine, (3) the court would apply Ninth Circuit law as substantive patent law issues were not involved, (4), under that law, "'a particularized showing of 'good cause' under *** Rule *** 26(c) *is sufficient to preserve the secrecy of sealed discovery documents attached to nondispositive motions'"* (emphasis in original), although the court elected to apply a heightened standard used by the district court, (5) the parties did not seek to seal entire documents, but instead, sought only to redact specific information, (6) declarations submitted by the parties to the district court were sufficient to establish a "significant interest in preventing the release of their detailed financial information" (footnote omitted), and (7) the public interest in disclosure was "relatively minimal," as "the financial information at issue was not considered by the jury and is not essential to the public's understanding of the jury's damages award." The Court of Appeals undertook the same analysis for the plaintiff's market research reports, which were attached to post-trial motions and reached the same result.

Note: This is, to say the least, a *comprehensive* decision. Here is one example when the Court of Appeals is discussing the standard to apply in ruling on motions to seal:

> There may be exceptions to the Ninth Circuit's general rule that the 'good cause' standard applies to documents attached to motions that are nominally non-dispositive. Indeed, in *In re Midland,* the Ninth Circuit applied the 'compelling reasons' standard to a *Daubert* motion because it 'may be effectively dispositive of a motion for summary judgment.' However, we are not aware of any Ninth Circuit precedent applying the 'compelling reasons' standard to non-dispositive motions regarding the admissibility of evidence at trial. The district court's reasoning—that the admissibility of evidence was a closely contested issue—does not justify departure from the Ninth Circuit's general rule. Indeed, evidence which a trial court rules inadmissible—either as irrelevant or inappropriate—seems particularly unnecessary to the public's understanding of the court's judgment.

Here is another example when the Court of Appeals is discussing the public interest in disclosure of the parties' financial information:

> The First Amendment Coalition's reliance on statements by Reuters and EFF representatives to demonstrate public interest is misplaced. The presumption in favor of public access to court documents is based on 'promoting the public's understanding of the judicial process and of significant public events.' ***. Shareholders' interests in determining financial risks and consumers' interests in manufacturing and pricing decisions simply are not relevant to the balancing test. In fact, if anything, by highlighting, for example, consumers' interests in such things as pricing decisions, it further underscores the potential harm that Apple and Samsung could face if their detailed financial information becomes public.

#Discovery Materials
#Court Proceedings

In re Application of the United States of America for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283 (4th Cir. 2013).

As part of its investigation of the unauthorized release of classified information to WikiLeaks, the Government secured a Section 2703(d) order that compelled Twitter to release records of electronic communications of certain individuals. The issuing magistrate judge also barred prior notice to the individuals, sealed the order and the accompanying application, and prohibited public docketing. While the application of the individuals to vacate, unseal and publically docket the application and order was pending, the district court changed its docketing procedure for 2703(d) orders: "The EC docket is a 'running list' that is publically available from the district court clerk's office. It indicates all assigned case numbers, the date of assignment, the presiding judge, and whether the case is sealed. However, it lacks individual docket entries filed in each case and the dates of such entries." Thereafter, the district court denied any relief. The individuals appealed. The Court of Appeals treated the individuals' appeal as a *mandamus* petition, "[a]s mandamus is the preferred method for reviewing courts' orders restricting access to criminal proceedings ***." The court denied the petition for the following reasons: (1) The district court had not erred in conducting a *de novo* review of the magistrate judge's decisions, (2) rights of access derive from two independent and distinguishable sources, the First Amendment and the common law, (3) the orders in issue, and related documents that were considered by the magistrate judge in determining whether to issue the orders, were "judicial records" for purposes of the presumption of access under the common law and First Amendment analysis, (4) the orders do not satisfy either the "experience" or "logic" prongs of the Supreme Court's decision in *Press-Enterprise,* and hence, there is no right of access under the First Amendment, (5) the common law right of access was outweighed by the government's significant interest in maintaining the secrecy of its investigation, and (6) the magistrate judge satisfied the procedural requirements for sealing, having "individually considered the documents, and redacted and unsealed certain documents." The Court of Appeals then addressed the docketing procedures: It

recognized that docket sheets existed to assure "meaningful access" to criminal proceedings. However, "We have never held, nor has any other federal court determined, that pre-indictment investigative matters such as ***[Section] 2703(d) orders, pen registers, and wiretaps, which are all akin to grand jury investigations, must be publically docketed ***. We refuse to venture into these uncharted waters, and as such, we refrain from requiring district courts to publically docket each matter in the *** [Section] 2703(d) context." In denying the petition, the court observed that, "at some point in the future, the government's interest in sealing may no longer outweigh the common law presumption of access."

#Dockets & Judicial Records

In re ATM Fee Antitrust Litig., 2007 WL 1827635 (N.D. Cal. June 25, 2007).

The plaintiffs in this antitrust action filed a supplementary discovery request shortly after December 1, 2006, two years into discovery, requesting the defendants be required to produce all electronically stored information in a form or forms in compliance with amended Rule 34(b). The court declined the plaintiffs' request, citing a previous agreement by the parties governing the form of production and concerns about confidentiality.

#Discovery Materials

Beavers-Gabriel v. Medtronic, Inc., No. 13-00686, 2014 WL 7882099 (D. Haw. June 20, 2014).

The parties to this products liability action could not agree whether, among other things, the plaintiff should be permitted to share information designated by the defendant as confidential with plaintiffs in other litigation involving the same product. The plaintiff could not explain how a sharing provision would benefit her in the pending action. Citing Foltz v. State Farm Mut. Auto. Ins. Co., the court found that good cause existed to allow confidential information to be used only in the pending action, directed the parties to submit a conforming confidentiality order, and observed that collateral litigants could follow the procedure set forth in Foltz to seek access to the information.

#Discovery Materials

Bernstein v. Bernstein Litowitz Berger & Grossman LLP, No. 15-0374-cv (2d Cir. Feb. 24, 2016).

The plaintiff in this civil action was a partner in a law firm. He alleged in the complaint that he had been forced to resign from the firm after he "blew the whistle" on unethical billing practices. After the firm argued that he had disclosed "confidential client information" in the complaint, the plaintiff secured permission to file it under seal for a limited time. Thereafter, the parties entered into a confidential settlement and sought a permanent sealing. The district court denied the request. The Court of Appeals affirmed. It held that the complaint was a

"judicial document" under both the First Amendment and the common law and that the parties offered no rationale to rebut the presumption of access. The Court of Appeals also held that there were no client confidences in the complaint that could justify sealing.

#Dockets & Judicial Records

Best v. County of Cumberland, Case No. 4:11-cv-00896 (M.D. Pa. Oct. 1, 2013).

The parties had reached a settlement during mediation and secured a sealing order. A local newspaper moved to intervene and unseal the settlement agreement. The district court held that the agreement was not a "judicial record" subject to the common law right of access as it had not been filed. However, the question of access was distinct from whether to modify or vacate the sealing order. "Given the strong presumption in favor of openness, the fact that this case involves a governmental entity, and that the seal would prevent disclosure *** under a relevant [Pennsylvania] freedom of information law, the seal should not continue and shall be vacated." The court noted that the parties had not made any substantive arguments in favor of maintaining the sealing order and that all the court had done was enable the newspaper to "pursue the information through other legal channels."

#Settlement

Branhaven, LLC v. Beeftek, Inc., 288 F.R.D. 386 (D. Md. 2013).

In this declaratory judgment action, the court imposed sanctions jointly and severally on the plaintiff and its individual attorneys for misleading responses leading up to a last-minute and flawed production of electronically stored information. Among other things, the court rejected the argument that production was delayed because a protective order was not in place: "While the court understands that there might be some delay in actual production of documents until a satisfactory protective order was in place, the lack of a final protective order does not excuse Branhaven from identifying and gathering the responsive documents nor from essentially misrepresenting that the responsive documents were ready for review as a soon as a date and time was agreed to."

#Discovery Materials

Brennan Ctr. for Justice v. DOJ, 697 F.3d 184 (2d Cir. 2012).

The plaintiff brought this action against the defendant after requesting information from three agencies under the FOIA. The plaintiff received denials from all three agencies, at which point it brought the action to court at the district level. In the litigation process, the information requested was whittled down to three memoranda, and the lower court granted summary judgment in favor of the plaintiff for all three documents. On appeal, the Court of Appeals granted in part the plaintiff's motion for summary judgment and reversed in part the remainder.

The first document, the "February Memorandum," was found to be a matter of public record because it was used as an authoritative reference. Therefore, the plaintiff's motion for summary judgment was granted for this memorandum. The defendant likewise filed for summary judgment on the February Memos, and its motion was denied because while attorney-client privilege does generally afford protection to private documents, when that document is adopted into policy and heavily relied upon, the same protections can no longer apply. For the remaining memo, the motion was denied. The next was the "July Memos," which were a communication series discussing proposed changes to agency policy. Because the documents were found to be purely deliberative, the Court held that these documents were protected.

#Freedom of Information Act

Carlson v. United States, 109 F. Supp. 3d 1025 (N.D. Ill. 2015).

This action was commenced by a naval historian/author and organizations seeking the release of transcripts of testimony before a grand jury investigating the Chicago Tribune in 1942. This was the "first and only time in U.S. history that the federal government attempted to prosecute a major newspaper for an alleged violation of the Espionage Act." The transcripts were held under seal by NARA. The Government opposed release, arguing that "historical significance" was not a permitting reason to disclose the transcripts under Criminal Rule 6(e)(3)(E). The parties agreed that none of the exceptions to grand jury secrecy set forth in the rule were applicable. The court held: (1) Nothing in the rules forbid a district court to release grand jury materials based on historical significance; (2) "federal courts possess inherent authority to release grand jury materials for reasons other than those contained in Rule 6(e);" and (3) a nine-factor test should be applied to determine whether to grant the relief sought. The court found that the factors favored release.

#Miscellaneous

Carnegie Mellon Univ. v. Marvell Tech. Grp., 2013 WL 1336204 (W.D. Pa. Mar. 29, 2013).

After a jury returned a verdict against the defendants in excess of one billion dollars in this patent infringement action, the defendants moved to seal demonstrative slides used by the plaintiff's damages expert during trial and also moved to seal an affidavit submitted on behalf of the defendants that went to a post-trial laches defense. Reviewing the law of the Third Circuit and distinguishing between trial materials that were filed and unfiled discovery materials, the court denied the motions: (1) The common law right of public access attached to the slides and the affidavit as these were "judicial records"; (2) sealing would be inappropriate for any information that was "readily available from the public trial transcript or elsewhere"; (3) there was a substantial public interest in the information in issue; and (4) the defendants had not demonstrated any compelling interest sufficient to overcome the presumption of access.

[Note: This summary conflates the court's analysis as to the slides and the affidavit and that, as to the latter, the court only addressed an unredacted version which the defendants intended to file].

#Court Proceedings

Center for Auto Safety v. Chrysler Goup, No. 15-55084 (9th Cir. Jan. 11, 2016).

The parties to this putative class action stipulated to a Rule 26(c) protective order as part of the discovery process. The plaintiffs thereafter moved for a preliminary injunction and both they and the Chrysler attached "confidential" documents to memoranda submitted on the motion. The district court allowed the documents to be sealed. The Center for Auto Safely moved to intervene to secure access to the documents. The district court denied relief, concluding that a preliminary injunction motion was "non-dispositive" and that good cause had been shown to justify the sealing. The Court of Appeals reversed. It held that preliminary injunctions are extraordinary remedies and that public access to the documents would promote the public interest understanding the judicial process. The Court of Appeals remanded for a party to demonstrate compelling reasons for sealing. Note that one judge dissented, contending that the majority had overruled Circuit precedent and "vitiated" Rule 26(c).

#Discovery Materials
#Miscellaneous

Center for Const. Rights v. Lind, 72 M.J. 126 (C.A.A.F. 2013).

The petitioners appealed from the summary denial of their petition for a *writ of mandamus* and prohibition pursuant to which they sought public access to documents filed in the prosecution of Bradley Manning. The Court of Appeals dismissed the appeal for lack of jurisdiction: "Here, the accused had steadfastly refused to join in the litigation, or, despite the Court's invitation, to file a brief on the questions presented. We thus are asked to adjudicate what amounts to a civil action, maintained by persons who are strangers to the court-martial, asking for relief *** that has no bearing on any findings and sentence that may eventually be adjudged by the court-martial." The appellate court held that it lacked statutory jurisdiction to address a nonparty's right of access claim. There were vigorous dissents which addressed the "absurd consequences" of a ruling which might give rise to a collateral challenge in an Article III court and the failure to afford standing to the media.

#Court Proceedings

Center for Effective Gov't v. Department of State, 2013 WL 6641262 (D.D.C. Dec. 17, 2013).

At issue in this FOIA action was whether a single document, "the Presidential Policy Directive on Global Development," was protected from disclosure by Exemption 5, the "presidential communications privilege." The document had been widely circulated within the Executive Branch and discussed in public. The district court held that it was not exempt: "Simply put, the purposes of the privilege are not furthered by protecting from public disclosure presidential directives distributed beyond the President's closest advisors for non-advisory purposes. Nor does invocation of an amorphous 'need to know' cure the problem where there is no claim of an advisory role between the document-recipient and the President."

#Freedom of Information Act

Century Indemnity Co. v. AXA Belgium, 2012 WL 4354816 (S.D.N.Y. Sept. 24, 2012).

In this case arising from a reinsurance contract dispute, both parties moved to seal documents under a confidentiality agreement that included the arbitration proceedings. The district court denied the motions to seal the documents because the parties failed to show a sufficient basis to seal relevant documents. The court explained that the parties sought to seal judicial documents to which the presumption of access attached, and the parties did not overcome the presumption. The court added that "the weight to be given the presumption of access ... is reasonably high" for the documents involved.

#Court Proceedings

Citizens for Responsibility and Ethics in Washington v. Federal Election Comm'n, 711 F.3d 180 (D.C. Cir. 2013).

"This case presents an important question of procedure under the Freedom of Information Act: When must a FOIA requester exhaust administrative appeal remedies before suing in federal district court to challenge an agency's failure to produce requested documents"? To answer that question, the Court of Appeals interpreted the meaning of a "determination" by an agency because, under FOIA, if an agency does not make a determination within time periods prescribed by the Act, a requester need not exhaust administrative remedies.

The plaintiff had submitted a FOIA request to the FEC. The records sought were produced over time, but some were withheld as being exempt from disclosure. The plaintiff filed suit, challenging the FEC's delay in responding to the request. The district court dismissed the action for failure to pursue administrative remedies. The Court of Appeals reversed:

"The statute requires that, within the relevant time period, an agency must determine whether to comply with a request—that is, whether a requester will receive all the documents the

requester seeks. It is not enough that, within the relevant time period, the agency simply decide to later decide. Therefore, within the relevant time period, the agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions."

#Freedom of Information Act

Clearly Food & Beverage Co. v. Top Shelf Beverages, Inc., 102 F. Supp. 3d 1154 (W.D. Wash. 2015).

The parties to this trademark dispute stipulated to a protective order. The order required them to confer before filing any document designated as confidential and consider whether any such document should be filed under seal. The defendant filed documents designated by the plaintiff in support of its summary judgment motion without having conferred. The documents were neither redacted nor filed under seal. The documents were sealed at the defendant's request eight days after filing in a manner inconsistent with the local rules. Thereafter, the court issued an order to directing the defendant's counsel to show cause why the documents were filed in violation of protective order and the sealing procedure prescribed by the local rules. Defense counsel admitted that he had erred. The court found no substantial justification for the admitted violation of the protective order and awarded the plaintiff its reasonable expenses, including attorneys' fees, incurred as the result of the defendant's conduct under Rule 37(b). The award was made against defense counsel. The court also reopened discovery so that the plaintiff could take a one hour telephone deposition of "a PACER representative on the sole topic of how many people viewed or downloaded the confidential documents *** during the time they were publically available on PACER ***. The scope of this deposition does not extend to the identities of the people who accessed the documents."

#Discovery Materials
#Dockets & Judicial Records

Constand v. Cosby, 112 F. Supp. 3d 308 (E.D. Pa. 2015).

The plaintiff commenced a civil action in 2005 against the defendant, "an internationally known entertainer," for assault and other tortious conduct. While being deposed, the defendant apparently admitted to the purchase of a drug that he planned to give women without their knowledge. After the deposition the plaintiff moved for sanctions and portions of the deposition were filed under seal pursuant to an interim order. The action settled before the motion was decided. In 2014, the Associated Press moved to intervene for access to the sealed transcript, which motion was granted. Applying Third Circuit precedent, including *Pansy v. Borough of Stroudsburg,* the court granted access. The court found, among other things, that the defendant had a diminished "zone of privacy" because of his public appearances and

statements, that he had responded publically to the allegations made against him, and that the public had a significant interest in the allegations. The court rejected the defendant's argument that he would suffer serious embarrassment should the transcript be released.

Note there is a lengthy procedural history here.

#Discovery Materials

Containment Tech. Grp. v. American Soc'y of Health Sys. Pharmacists, 2008 WL 4545310 (S.D. Ind. Oct. 10, 2008).

Prior to discovery in a defamation action, the parties disputed the terms of a proposed protective order affecting the production of proprietary information. The plaintiff sought an order allowing it to designate entire documents containing proprietary information as "confidential." Such documents, if filed with the court, would automatically be filed under seal. The defendants objected to blanket designations of entire documents, citing circuit precedent requiring particularized findings of "good cause" before documents could be filed under seal. The court acknowledged that document-by-document review would be "painstaking" and that "[m]assive electronic discovery production has significantly added to this challenge," but that the parties need to distinguish between the scope of review needed for production to each other in discovery, and the scope of review needed before filing documents with the court under seal. At the level of discovery, the parties should agree to act in good faith in making confidentiality designations, but the parties need to make particularized showings that good cause exists for filing documents with the court under seal.

#Discovery Materials

Courthouse News Serv. v. Planet, 614 F. App'x 912 (9th Cir. 2015) (*per curiam*).

The plaintiff challenged the Ventura County Superior Court's denial of timely access to newly filed complaints. The complaint alleged delays "stretching up to 34 calendar days." In an earlier decision reported at 765 F.3d 776 (9th Cir. 2014), the Court of Appeals held the district court lacked discretion to abstain under *Railroad Comm'n v. Pullman Co.,* 312 U.S. 496 (1941), from addressing the First Amendment issues at stake. On remand, the district court held that the First Amendment right of access did not mandate same-day access and granted the defendant's Rule 12(b)(6) motion. On appeal, the Court of Appeals held that the district court disregarded the mandate by ignoring the length of delays pled in the complaint. It again reversed and remanded with instructions to reassign the action to a different district judge.

#Dockets & Judicial Records

Delaware Coalition for Open Gov't, Inc. v. Strine, 733 F.3d 510 (3d Cir. 2013), *cert. denied,* __ S. Ct. __ (2014).

"This appeal requires us to decide whether the public has a right of access under the First Amendment to Delaware's state-sponsored arbitration program [binding arbitration before a judge in a courtroom] … The District Court found that Delaware's proceedings were essentially civil trials that must be open to the public." The Court of Appeals affirmed but applied the "experience and logic" test: (1) "Our experience inquiry *** counsels in favor of granting public access to Delaware's proceedings because both the 'place and process' of Delaware's proceeding 'have historically been open to the press and general public;'" and (2) "[t]he benefits of openness weigh strongly in favor of granting access ***. In comparison, the drawbacks of openness *** are relatively slight." The court noted, for example, that parties could secure an order to protect confidential information.

#Court Proceedings

Doe v. Megless, 654 F.3d 404 (3d Cir. 2011), *cert. denied,* 132 S. Ct. 1543 (2012).

The plaintiff filed a Section 1983 action against the public school officials after they distributed a flyer advising the public to contact the police if the plaintiff was seen around schools. The plaintiff moved to proceed anonymously, which was denied by the district court. After plaintiff refused to litigate openly, the case was dismissed with prejudice pursuant to FRCP 41(b). The Court of Appeals affirmed. Adopting a nine-factor balancing test to determine whether a litigant may remain anonymous, the Court of Appeals ruled that pseudonyms should be reserved only for litigants who can show a reasonable fear of severe harm that outweighs the public's interest in open litigation. The Court of Appeals found that the only factor weighing in the plaintiff's favor was that denying the use of a pseudonym could potentially sacrifice a valid claim. On the other hand, because the plaintiff's identity was already revealed and known at the time the defendant distributed the materials, the Court of Appeals concluded that litigating publicly would provide the plaintiff with the opportunity to clear his name.

#Pleadings & Orders

Electronic Privacy Info. Ctr. v. Department of Homeland Sec., 892 F.Supp.2d 28 (D.D.C. 2012).

The plaintiff requested files from the defendant under the FOIA, which the defendant denied primarily under Exemption 4 of the same Act. The plaintiff filed suit in response. Because the parties did not dispute any material facts, they moved for summary judgment. Exemption 4 of the FOIA protects information that may be considered a trade secret or financial information that may be privileged or confidential. The plaintiff asserted that this Exemption did not apply to the

documents in full, and thus the producing of the segregable, non-privileged information was still necessary. The Court found that the information in question was sensitive insofar as it disclosed scan rates for the defendant's body scanner technology, which could be used by competitors to gain the upper hand. Therefore, Exemption 4 applied to the materials requested by the plaintiff. Of the documents that did not fall within the scope of Exemption 4, the defendant argued that Exemption 5, which protects agency memoranda and letters that would not otherwise be available to an outside party, applied to those. The Court agreed, on the reasoning that the documents in question originated in a government agency and the documents were part of the deliberative process of governmental decisions or policies. Further, the Court found that all segregable materials had already been produced for the plaintiff. Thus, the plaintiff's motion for summary judgment was denied because all documents were protected under Exemptions 4 or 5 and were deemed unsegregable, and the defendant's motion for summary judgment was granted. Additionally, the plaintiff requested and was deemed eligible to receive attorney's fees following the opinion of the Court.

#Freedom of Information Act

Estate of Carlock v. Williamson, **2011 WL 285626 (C.D. Ill. Jan. 26, 2011).**

This was an action brought to recover damages for injuries sustained by a decedent who was allegedly subjected to excessive force and received inadequate medical treatment. The plaintiff moved for discovery-related sanctions against the defendants and attached documents to the publically filed motion, which defendants alleged, were subject to the attorney-client privilege and work product protection and had been inadvertently produced. These and other documents were ordered sealed and a newspaper publisher moved for leave to intervene and challenge the sealing. The court found that the publisher had standing under Rule 24(b) because "permissive intervention is a procedurally appropriate device for bringing a third-party challenge to a protective order." Turning to the merits, the court then denied the motion to intervene, reasoning: (1) the documents were subject to a claim of privilege, (2) under Rule 26(b)(5)(B), the plaintiff should *not* have filed the documents publically but only for the purpose of *in camera* review, and (3) the defendants would be unduly prejudiced because, "it would aggravate the injury to Defendants' rights to allow SJR [the publisher] to intervene to seek unsealing of documents that should not have been publically filed in the first place."

#Discovery Materials

Ferron v. Search Cactus, LLC, **2008 WL 1902499 (S.D. Ohio Apr. 28, 2008).**

In this action brought under the Ohio Consumer Sales Practices Act alleging distribution of unlawful unsolicited emails, the defendant requested inspection of the plaintiff's computer to determine if the emails were indeed unsolicited or were actively solicited to create a cause of action. The court held a telephone conference call and found that the plaintiff had not taken

reasonable steps to preserve relevant information, the plaintiff had not produced relevant information, and that the computer hard drives were the only available sources of relevant information. Concerned about confidentiality and privilege, however, the court issued a detailed protocol covering the conduct of the inspection.

#Discovery Materials

Flynt v. Lombardi, 782 F.3d 963, 967 (8th Cir. 2015) (*per curiam*).

The plaintiff moved to intervene pursuant to Rule 24(b) in two actions that challenged Missouri's protocol for carrying out executions for the limited purpose of unsealing court records and docket entries. The district court denied his motion, stating that a "generalized interest in a subject of litigation does not justify intervention." The Court of Appeals reversed. It concluded that permissive intervention under Rule 24(b) was an "appropriate procedural vehicle" to obtain judicial records, an independent basis for jurisdiction was not required, and intervention might often preferable for reasons of judicial efficiency. The court did note that "whether a party is allowed to intervene is distinct from the issue of whether the party's motion to unseal should be granted" and remanded.

#Dockets & Judicial Records

FTC v. Abbvie Prod. LLC, 713 F.3d 54 (11th Cir. 2013).

The FTC instituted an antitrust action against the defendant arising out of a settlement between the defendant and others. During the prelitigation investigation, the defendant voluntarily disclosed a confidential document to the FTC, which the FTC attached as the sole exhibit to the antitrust complaint. The district court sealed the document. After the dismissal of the complaint and a grant of *certiorari*, the FTC persuaded the district court to unseal the document so that it could be discussed openly in the Supreme Court. The district court did so based on a finding that the harm that the defendant might suffer from any unsealing had been reduced over the intervening three years. The Court of Appeals affirmed, holding (1) the complaint was a "judicial record" to which the common law right of access attached, (2) the exhibit to the complaint constituted a judicial record regardless of whether the exhibit played a "discernible role in the resolution of the case," (3) the district court did not err in balancing the public interest in viewing the exhibit against the defendant's confidentiality interest, and (4) the defendant's concern that a plaintiff might "exploit" the right of access to attach confidential documents to pleadings was speculative and other remedies existed to remedy any abusive tactics.

#Dockets & Judicial Records

In re Gen. Motors LLC Ignition Switch Litig., No. 14-MC-2543 JMF, 2015 WL 4750774, (S.D.N.Y. Aug. 11, 2015).

The parties in this products liability action were engaged in a discovery dispute. The plaintiffs submitted an initial letter in redacted form as well as an accompanying exhibit under seal because the defendant had designated information "highly confidential" under a confidentiality agreement. The court noted that the agreement is insufficient to overcome the presumption of public access to judicial documents and directed the parties to confer about maintaining the documents under seal.

#Discovery Materials

Gerlich v. DOJ, 404 U.S.App.D.C. 256, 711 F.3d 161 (2013).

This action arose out of a "dark chapter" in the history of DOJ's Honors Program. The plaintiffs alleged that they had been "de-selected" from participation in the program because of their political affiliation. The district court dismissed claims asserted by the plaintiffs under the Privacy Act. The Court of Appeals reversed, concluding that a permissive spoliation inference was appropriate. The spoliation arose from the failure of responsible DOJ officials to maintain documents relevant to the de-selection process. On appeal, the plaintiffs argued that the documents, which were admittedly not part of DOJ's system of records, should have been "functionally" incorporated in to the records system. The Court of Appeals declined to address the argument as it had not been raised below. However, the Court of Appeals did hold that, "[t]he obligations the Privacy Act established *** apply even when the agency does not maintain the records at issue in its system of records" because the common law duty to preserve had been triggered before the documents had been destroyed, and there was sufficient evidence that the destroyed documents were relevant to a Privacy Act claim.

#Miscellaneous

Glock v. Glock, 797 F.3d 1002 (11th Cir. 2015).

The plaintiff divorced her husband in an Austrian proceeding. She secured documents in aid of that proceeding from the husband's business entities in the United States pursuant to 28 U.S.C. Section 1782. There was no objection to doing so but the documents were secured under a confidentiality order that limited use to proceedings in which the plaintiff was a party. Thereafter, she filed a RICO action against the husband and the entities in a United States district court and sought to use the documents secured through Section 1782. A magistrate judge allowed her to do so. The defendants objected. They argued, among other things, that Section 1782 prohibited documents obtained for use in foreign proceedings to be used in litigation in the United States. The district court agreed and barred the use of the evidence

although it did not preclude the plaintiff from seeking the documents in the RICO action. The Court of Appeals reversed: (1) Section 1782 was "entirely silent" on use of documents in the United States and nothing in the legislative history suggested otherwise; (2) allowing parties to use discovery lawfully obtained under Section 1782 would further the goals of Rule 1; and (3) the confidentiality order did not bar the use of the documents.

Note this decision was decided before the effective date of the 2015 amendments to the Federal Rules of Civil Procedure.

#Discovery Materials

In re Google, Inc., 462 F. App'x 975 (Fed. Cir. 2012).

During a business presentation held approximately three weeks before this patent and copyright infringement suit was filed, the plaintiff's attorneys asserted that the defendant's Android smartphone platform infringed on the plaintiff's patents. The defendant's senior counsel was present at this business presentation. Ten days later, the defendant's senior counsel met with a general counsel and a software engineer to formulate a response to the plaintiff's infringement claims. A week later, the engineer sent an email to the vice president and copied the senior counsel, himself, and another engineer on the email. The plaintiff subsequently filed suit. During discovery, the defendant listed the final version of the engineer's email on its privilege log, but produced "autosaves" or periodic snapshots of the email as it was being drafted. At a hearing regarding a motion to compel the engineer's deposition, plaintiff referenced the substance of the engineer's email without objection by the defendant. The following day, however, the defendant asked the plaintiff to return all versions of the email, asserting they were protected material because the engineer had purportedly prepared the email at the behest of the defendant's lawyers, as part of an investigation into the infringement lawsuit. The plaintiff filed a motion to compel disclosure of the email and its versions. After examining the material *in camera,* the magistrate judge ordered production of the documents, citing the defendant's failure to make a "clear showing" that the email was sent to counsel in his capacity as an attorney conducting a legal investigation. The district court denied the defendant's motion for relief from that order, concluding that "[r]equiring a clear showing of privilege in light of [the attorney's] role as in-house counsel was not clearly erroneous or contrary to law." The defendant appealed on the grounds of privilege. The federal circuit agreed with the plaintiff's argument that the email itself refuted the defendant's privilege claim because: (1)The engineer stated in the email that he was responding to a request from the defendant's management, not the defendant's attorneys; (2) the engineer directed the email to his vice president rather than to counsel; (3) the email explained that its purpose was "to investigate what technical alternatives exist to Java for

Android and Chrome;" and (4) the email's discussion was directed at a negotiation strategy as opposed to a license negotiation as a component of legal strategy. Accordingly, the defendant's petition for a writ of mandamus was denied.

#Discovery Matters

GPNE Corp. v. Apple Inc, No. 12-CV-02885-LHK, 2015 WL 4381244, (N.D. Cal. July 16, 2015).

The defendant moved to file under seal "specific line items from third-party e-discovery vendor invoices" submitted in support of its bill of costs. Applying *Kamakana v. City & County of Honolulu,* which distinguished between materials filed in support of dispositive and non-dispositive motions, the court held that the "good cause" standard of Rule 26(c) applied that had been met because the defendant made a "'particularized showing' that 'specific prejudice or harm will result' if certain confidential terms of Defendant's financial relationship with its e-discovery vendors are made public."

#Dockets & Judicial Records

In re Grand Jury Subpoenas, 627 F.3d 1143 (9th Cir. 2010).

Note: This appeal has an unusual posture. As will be explained below, certain law firms moved to quash grand jury subpoenas. The district judge granted the motion to quash but did so to allow appellate review. As the Court of Appeals noted, "[w]e do not read the district court's decision as an exercise of discretion but as a passing of the decision to this court. We are not reviewing an exercise of discretion but a request for guidance".

The government commenced a criminal antitrust investigation. Thereafter, civil actions were commenced against the companies under investigation. Law firms were retained to represent the companies in those actions. In the course of discovery, the firms produced documents that originated outside the United States. Grand jury subpoenas were issued to the firms for the production of these documents. The Ninth Circuit reversed the order to quash because: (1) There was no evidence of collusion between the civil plaintiffs and the government; (2) there was no claim of privilege; and (3) The court applied its "per se rule that a grand jury subpoena takes precedence over a civil protective order."

Summarizing, the Ninth Circuit stated, "[b]y a chance of litigation, the documents have been moved from outside the grasp of the grand jury to within its grasp. No authority forbids the government from closing its grip on what lies within the jurisdiction of the grand jury."

#Miscellaneous

Green v. Cosby, Misc. No. 15-144 (E.D. Pa. Sept. 4, 2015).

This action arose out of a subpoena issued in a Massachusetts action brought against the defendant. The defendant moved to quash the subpoena, which sought the production of documents that a Philadelphia attorney had in her possession related to the Massachusetts plaintiffs due to the attorney's representation of the plaintiff in *Constand v. Cosby.* The defendant argued that the documents fell within a confidentiality provision of the *Constand* settlement agreement. Before the motion was decided discovery in the Massachusetts action was stayed. The Pennsylvania court then stayed the motion to quash. Defendant then sought leave to conduct discovery of the Philadelphia attorney related to the release of the transcript of his deposition in *Constand* which, he alleged, violated the Pennsylvania stay order. The court denied the motion because the order "cannot be read to regulate Ms. Troiani's [the Philadelphia attorney] conduct, if any, in connection with a third party's release of the Constand documents to the media or to give Ms. Troiani notice of any such regulation."

#Discovery Materials

Hinklin Engineering, L.C. v. Bartell, No. 05-2282 (7th Cir. Feb. 22, 2006).

This was a dispute between an employer and ex-employee arising out of alleged theft of trade secrets. The parties consented to disposition by a magistrate judge. The magistrate judge ordered the clerk to seal substantive opinions. On appeal from a summary judgment award the Court of Appeals having been advised that the opinions did not contain confidential information, directed its clerk to make the opinions public and admonished, "[w]e hope never to encounter another sealed opinion." The Court of Appeals commented that, if opinions included confidential information, the appropriate procedure would be to have opinions and briefs "in the public record, if necessary in parallel versions – one full version containing all details, and another redacted version with confidential information omitted."

#Dockets & Judicial Records
#Pleadings & Orders

International Counsel Bureau v. Department of Defense, 906 F.Supp.2d 1 (D.D.C. 2012).

ICB brought this action under FOIA to obtain video recordings of Guantanamo Bay detainees. On cross-motions for summary judgment, the court found that the DOD provided sufficient evidence to demonstrate that releasing the videos "reasonably could be expected to result in damage to the national security." The court found ICB's assertions to be insufficient and disagreed with its argument that the DOD's position was hypothetical and conclusory.

#Freedom of Information Act

Jacobs v. Las Vegas Sands Corp., No. 10 A 627691 (D. Nev. Sept. 14, 2012).

The plaintiff sued his former employer, Las Vegas Sands ("Sands"), alleging he was dismissed because he would not give in to "illegal demands" from the chairman and majority-owner of the Sands. Jacobs said the chairman directed him to secretly investigate Macau government officials and to use "improper leverage" against them. Following the plaintiff's allegations, the Justice Department and SEC opened investigations into whether the Sands violated the Foreign Corrupt Practices Act that prohibits companies with U.S. operations and their intermediaries from making improper payments to foreign officials to win or retain business. The Sands denied the allegations and said it is cooperating with the investigations. In June 2012, the Sands lawyers disclosed to the plaintiff that the plaintiff's emails and other computer files had been in Las Vegas for more than a year while the defendants' lawyers argued to the court that the Macau Personal Data Privacy Act prevented them from bringing data to the U.S. from Macau and that all data had to be reviewed first by the Sands China lawyers in Macau. The judge ordered a sanctions hearing. During the three-day hearing, the Sands lawyers admitted to shipping the plaintiff's emails and a copy of his hard drive to the U.S. in 2010 to preserve evidence. The lawyers argued that they had disclosed to the plaintiff and the judge that there was evidence from Macau in the U.S. The Sands lawyers also admitted that they reviewed the plaintiff's emails. The court concluded that the Sands willfully and intentionally withheld pertinent information. Accordingly, the Sands was precluded from raising Macau's personal data privacy law as an objection to disclosing evidence, an issue that could bear on whether the Nevada court had jurisdiction over Sands China. The judge also ordered Sands to pay $25,000 to the Legal Aid Center of Southern Nevada and to pay the attorneys' fees of the plaintiff that related to those portions of hearings over the past year that were devoted to discussions of the Macau privacy law.

#Discovery Materials

John B. v. Goetz, 531 F.3d 448 (6th Cir. 2008).

In this class action against the State of Tennessee alleging violation of the Social Security Act by failing to provide required medical screening, vision, hearing, and dental services to approximately 500,000 children enrolled in the state's TennCare program, the trial court ordered the defendants to allow the plaintiffs' computer expert, under the supervision of a court appointed monitor, to inspect computer hard drives of various state agencies and 50 state employees and make forensic images to determine if any relevant data had been deleted in violation of court preservation orders. The trial court's order extended beyond the state's servers and hard drives of state employees in their offices to include home computers, and authorized the court-appointed monitor, plaintiff expert, and U.S. Marshal to visit the homes of the 50 affected state employees to execute the order. The defendants petitioned the Sixth Circuit Court

of Appeals for a writ of mandamus, which the court granted, finding the district court's order to be "clearly erroneous as a matter of law." Citing *The Sedona Principles* and Rules 37(a) and (e), the court noted that it is the responsibility of the responding party to preserve and produce relevant information, and "mere skepticism that an opposing party has not produced all relevant information is not sufficient to warrant drastic electronic discovery measures" such as forensic examination. The court further found that the district court's orders "fail to account properly for the significant privacy and confidentiality concerns present in this case" and "implicate federalism and comity considerations not present in typical civil litigation."

#Discovery Materials

***Laugher v. New York,* No. 13-cv-06171 (S.D.N.Y. Nov. 24, 2014).**

Defendants moved to, among other things, prohibit plaintiff's counsel from sharing the video deposition of a NYC Commissioner with the media. Applying Rule 26(c), the court held that unfiled videos of depositions are not subject to the presumption of public access and that defendants must made a showing of good cause for the relief. The court found that they had not done so. The Commissioner's status as an appointed official, "along with the pre-existing public interest in this case," favored access. The court also held that the "Standing Protective Order of this Court's Section 1983 Plan" could be applied to allow "editing and splicing sections of the video marked as confidential." Finally, as a prophylactic measure, the court adopted NYRPC 3.6 as an order to protect the defendants' right to a fair trial and limit extrajudicial statements by counsel.

#Discovery Materials

***Leigh v. Salazar*, 677 F.3d 892 (9th Cir. 2012).**

A photojournalist plaintiff sued various government agencies, claiming that viewing restrictions at a Bureau of Land Management (BLM) horse roundup violated her First Amendment right to observe government activities. The district court denied preliminary injunctive relief and the plaintiff appealed. The Ninth Circuit reversed and remanded, holding: (1) the case was not moot because plaintiff sought unrestricted access to future horse roundups, and not just the most recent one; and, (2) the district court had erred by failing to apply the qualified right of access balancing test (as set forth in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986)) when ruling on whether plaintiff was likely to succeed on the merits of her First Amendment claim.

#Miscellaneous

In re Los Angeles Times Comm'ns LLC, (9th Cir. Oct. 16, 2013).

A nonparty news organization challenged portions of a trial court's orders by an emergency petition for *mandamus* relief. The petition was granted: "The portions of the Orders that prohibit members of the media and the public from disclosing information contained in court records or disclosed in open court, including the names of individuals identified in videotapes played in court are VACATED. Those portions of the Orders that strike from the record any personal information shown during the playing of the videotapes at issue at the evidentiary hearings are also VACATED."

#Court Proceedings

Marceaux v. Lafayette City-Parish Consol. Gov't, 731 F.3d 488 (5th Cir. 2013).

In this Section 1983 action, current and former officers alleged that the defendants had imposed a "code of silence" prohibiting them from reporting illegal conduct. The officers communicated with the media and maintained a website concerning the case. The district court restricted communications and directed that the website be taken down, "the primary rationale *** [being] to allow for a fair trial by avoiding a taint on the prospective jury pool." The officers took an interlocutory appeal. The Court of Appeals held that it had jurisdiction under the collateral order doctrine. The court noted that the officers were, "willing to accept the application to them of *** [rules of professional conduct that restrict communications with the media], although those rules ordinarily would not apply to clients who are not lawyers" and only challenged the direction that the website be taken down. The Court of Appeals vacated the takedown order, reasoning: (1) The district court failed to take a "nuanced approach to the delicate balance between the necessity of avoiding a tainted jury pool and the rights of the parties to freely air their views and opinions in the 'market square' now taking the form of the electronic square known as the Internet" by the "wholesale striking" of the website"; (2) the harm which the district court sought to prevent would be measured under "a substantial likelihood of prejudice" test; (3) the officers had a "propensity to make extra-judicial statements," but (4) the statements did not establish a "nexus between the comments and the potential for prejudice to the jury venire through the entirety of the Website"; and (5) "the district court erred in concluding that the entirety of the Website was substantially likely to cause prejudice." The Court of Appeals remanded, but reminded the district court to "engage in specific review of any claimed improper material. In this process, the district court has considerable, but not unfettered, discretion."

#Court Proceedings

Martin v. Hearst Corp., 777 F.3d 546, 550 (2d Cir.) cert. denied, 136 S. Ct. 40, 193 L. Ed. 2d 26 (2015).

The appellant had been arrested and charged with drug-related crimes in 2010. Local news outlets reported on her arrest at the time. The charges were "nolled" and records of her arrest

and prosecution destroyed under Connecticut law in 2012. The news reports remained available online after the records had been destroyed. The appellant filed suit against the "publishers" of the online reports, alleging "various publication-related torts." She contended that the law "rendered it factually false to continue to state that she had been arrested." The district court granted summary judgment on all claims. The Court of Appeals affirmed:

> the Erasure Statute requires the State to erase certain official records of an arrest and grants the defendant the *legal status* of one who has not been arrested. But the Erasure Statute's effect ends there. The statute creates legal fictions, but it does not and cannot undo historical facts or convert once-true facts into falsehoods.

The Court of Appeals also rejected the appellant's argument that the reports were defamatory because these had not mentioned that the charges had been nolled: "The news reports *** do not imply any fact *** that is not true. *** Reporting Martin's arrest without an update may not be as complete a story as Martin would like, but it implies nothing false about her."

Note this decision did not address the protected status of the media under the First Amendment but focused on traditional tort principles. However, *Martin* stands in stark contrast to the so-called "right to be forgotten" under European Union law.

#Miscellaneous

McKay v. Federspeil, Case No. 14-cv-10252 (E.D. Mich. May 20, 2014).

The plaintiff brought a First Amendment challenge to an administrative order of a State court that prohibited the public from possessing and using electronic devices to record proceedings in that court. The plaintiff moved for reconsideration of the denial of his preliminary injunction motion, which was premised on a "First Amendment right for citizens to record courtroom proceedings." The district court denied the motion for reconsideration, concluding that his asserted right was "unsupportable in light of Supreme Court precedent." Having so concluded, the district court declined to consider whether electronic devices are "less disruptive than broadcasting equipment."

#Court Proceedings

Mendez v. City of Gardena, No. 13-cv-09042 (C.D. Ca. July 14, 2015).

"This civil rights action arose when police officers' detention of suspected bicycle thieves turned into a shooting spree – resulting in several injuries and the death of one plaintiff." Video footage taken by police car cameras was producing during discovery under a blanket confidentiality order and later filed as part of a summary judgement motion. The parties agreed to a voluntary dismissal before the motion was decided. Thereafter, media organizations

moved to unseal the footage on First Amendment grounds. The court allowed permissive intervention under Rule 24(b)(2). It found a four-month delay in moving to intervene was not untimely, "especially given that the case was still pending during three of those months." The court also denied what it construed to be the defendant's argument that it should abstain because the motion "purportedly raised an issue under the California Public Records Act." Turning to the merits, the court unsealed the footage:

The *** rationale for sealing the subject videos was the parties' stipulated protective order ***. However, the parties cannot contractually agree to deprive the public of its strong First Amendment interest in accessing these videos, which were filed in connection with a dispositive motion.

Moreover, public monies were spent to settle, the defendants could not assert a valid compelling interest in sealing the videos, the plaintiffs wished the videos to become public, and the videos were not "overly gory or graphic in a way that would make them a vehicle for improper purposes." The court also denied a request for a stay pending appeal.

#Discovery Materials
#Dockets & Judicial Records
#Settlement

Menifee v. Department of the Interior, 931 F.Supp.2d 149 (D.D.C. 2013).

In this FOIA action, the plaintiff challenged, among other things, the alleged failure of the defendants to produce documents responsive to her requests. Rejecting that challenge, the district court observed that, "[t]he question is not whether other responsive documents may exist, but whether the search itself was adequate," and that, "[t]here is no requirement that an agency search every record system, but the agency must conduct a good faith, reasonable search of those systems of records likely to possess the requested information." The court then reviewed the procedure used to respond to the plaintiff's requests and found it to be adequate.

#Freedom of Information Act

In re Midland Nat. Life Ins. Co. Annuity Sales Practices Litig., 686 F.3d 1115 (9th Cir. 2012).

In this class action brought under RICO and state law, an insurance company intervened and moved to unseal an expert witness' report and any related records. The expert had been appointed by the court to assist in resolving whether the parties were entitled to summary judgment. The district court granted the motion for limited purpose intervention but denied the motion to unseal the judicial records, ruling that the strong presumption in favor of public access to judicial records did not apply to the records at issue because they were attached to a non-dispositive *Daubert* motion. The district court explained that the motion was non-dispositive in

nature because "it would not have been a determination on the merits of any claim or defense." Applying the "good cause" standard, the district court ruled that the insurance company had not offered a sufficient reason to unseal. On appeal, the insurance company argued that the strong presumption of access to judicial records applied, despite the connection to the *Daubert* motion, because the judicial records were also filed in connection with summary judgment proceedings. Reviewing the denial of the motion to unseal *de novo*, the appellate court held that the district court erred by asserting without elaboration that there were "compelling reasons" to keep the records sealed, instead of "conscientiously balance competing interests and articulate a factual basis for the "compelling reasons" to keep under seal the judicial records associated with a dispositive motion. The appellate court emphasized that the *Daubert* motion and related records were potentially "dispositive of a motion for summary judgment," pertaining to "central issues bearing on the defendant's summary judgment motion."

#Court Proceedings

***Moffat v. DOJ,* 716 F.3d 244 (1st Cir. 2013).**

The plaintiff, a convicted murderer, filed a FOIA action for information from the FBI which he thought would exonerate him. The Government produced certain heavily redacted documents and asserted exemptions to disclosure of others. The district court found that the plaintiff had secured all the relief he was entitled to and awarded summary judgment to the Government and attorneys' fees to the plaintiff. One document was at issue on appeal, an FBI report that was produced to the plaintiff during his prosecution with some redactions but was produced in the FOIA process with *less* redactions on the grounds that the redactions in the document, which had been prepared for law enforcement purposes "could reasonably be expected to constitute an unwarranted invasion of personal privacy" under Exemption 7(C) or "could reasonably be expected to disclose the identity of a confidential source" under Exemption 7(D). The Court of Appeals affirmed as to Exemption 7(C), concluding: (1) the earlier revelations of exempt information did not destroy an individual's privacy interests; and (2) the plaintiff had not identified a public interest sufficient to outweigh the privacy interest but had rather identified only a personal one in challenging his conviction. The Court of Appeals also affirmed as to Exemption 7(D): "Exemption 7(D)'s shield does not necessarily disappear when some fraction of the information requested has come to light." The Court of Appeals also rejected the plaintiff's contention that the Government had acted in bad faith in responding to his FOIA request: The Government appropriately applied the exemptions and the nature of the Government's search, which resulted from "resource constraints," did not evidence bad faith. The Court of Appeals also affirmed as to the fee award.

#Freedom of Information Act

Mohideen v. Calnet, Inc., Civil No. 13cv799 (S.D. Ca. Mar. 14, 2014).

The plaintiff in this retaliation and wrongful termination sought production of records pertaining to fellow employees. The defendant employer resisted production, relying on "third party personal privacy protections." Having found the records discoverable and with a protective order in place, the court ordered production: "there is a minimal encroachment of the privacy right because any sensitive information can be labeled 'Confidential.' *** The business and employment records will not be shared beyond the purposes of the litigation. If any confidential documents are filed *** they will be filed under seal."

#Discovery Materials
#Dockets & Judicial Records

Moore v. CIA, 666 F.3d 1330 (D.C. Cir. 2011).

The plaintiff requested information from the CIA and DOJ relating to his grandfather, a deceased Icelandic citizen. In response, the CIA stated that it could neither confirm nor deny whether it maintained any such records (a "*Glomar* response"). The FBI, however, released one of its reports to the plaintiff, which had been redacted as requested by the CIA. The report indicated that the plaintiff's grandfather had ties to a communist party and identified the CIA as the source of this information. The plaintiff brought a FOIA action against the CIA challenging its *Glomar* response. The CIA submitted a declaration to the court confirming its request to the FBI to withhold certain CIA-originated information in the report. The district court entered summary judgment in favor of the CIA. On appeal, the plaintiff argued that the CIA, in its declaration to the court, officially acknowledged that it maintained information responsive to the plaintiff's FOIA request and, therefore, could no longer use a *Glomar* response. The appellate court affirmed, finding that the declaration on its own did not constitute official acknowledgment sufficient to waive a *Glomar* response. Although the CIA confirmed in its declaration that some "CIA-originated information" was redacted from the report, the court concluded that the plaintiff failed to identify specific records or dispatches in the declaration matching his FOIA request.

#Freedom of Information Act

Newsday LLC v. County of Nassau, 730 F.3d 156 (2d Cir. 2013).

This Section 1983 action arose out of allegations that various state officials had negligently contributed to a murder. The district court executed an order prohibiting the release of the contents of an internal investigation report. The parties thereafter entered into a settlement contingent on approval by a county legislature. The district court provided the report to county legislators under a second confidentiality order, which one legislator apparently violated by

revealing protected information. A civil contempt hearing was held. The press was excluded in part and transcripts were sealed. The legislator was held in contempt. The press intervened and appealed. Two questions were presented: "First, does the First Amendment's presumptive right of access to court proceedings attach to civil contempt proceedings and related documents? Second, for each of the documents sought, does that presumptive right of access require disclosure in this particular case?"

Answering the first question, the Court of Appeals held that, "[u]nder the experience-and-logic approach, civil contempt proceedings, which carry the threat of coercive sanctions, implicate First Amendment values" and that, "the First Amendment right applies to civil contempt proceedings." The court also held that that, "[o]nly those documents necessary to understand the merits of a civil contempt proceeding are covered by the First Amendment's presumptive right of access."

In answering the second question, the Court of Appeals concluded: (1) Sealing the hearing transcript was improper, as it did not reveal information sufficiently confidential to outweigh access; (2) sealing the report itself was not in error, as it was used solely to refresh the recollection of a witness.

In footnote 8, the Court of Appeals had this to say about *ex ante* versus *ex post* access decisions:

> Although the issue of access to the physical courtroom as such is moot, the question is nevertheless squarely presented to us because intervenors seek release of the transcripts of those proceedings, and the question whether the First Amendment right applies to the transcripts is identical to whether the right applies to the physical proceedings.

The Court found a difference between the applicable legal standards and the practical considerations involved in applying them. Noting that a district judge considering whether to close a courtroom is necessarily engaged in an exercise of prediction regarding the potential for disclosure of material that may justifiably be protected even against the presumptive right of public access, it went on to state that that fact does not warrant indiscriminate courtroom closure because, in many cases, courts will be able to identify in advance those areas of testimony and portions of proceedings in which the risk of disclosure is greater or less. Relying on its respect for the discretionary decisions of district judges, the court reasoned that judges (especially appellate judges) deciding whether transcripts can be released after the fact have the benefit of hindsight and can determine more clearly whether the actual testimony in fact disclosed matters that are appropriately sealed. Therefore, a finding *ex post* that a transcript is subject to public access in full does not entail the conclusion that the district court erred in excluding the public from the courtroom *ex ante*."

#Court Proceedings

New York Times Co. v. Department of Homeland Sec., 959 F.Supp.2d 449 (S.D.N.Y. 2013).

The plaintiffs commenced this FOIA action to compel DHS to turn over certain information pertaining to aliens who had been convicted, served their sentences, but had not been removed from the United States. DHS had produced information but had redacted individual names, citing personal privacy interests under Exemptions 6 and 7(C). Granting summary judgment in the plaintiffs' favor, the district court held: (1) The disclosure of individual names implicates a privacy interest; and (2) the public interest in monitoring how DHS handles the aliens outweighed their privacy interests "in not releasing in compiled from information which is already public."

In addressing the privacy interests, the district court stated: "[T]here is a difference between the 'practical obscurity' of the existence of public records regarding individuals' prior convictions, and records regarding immigration status, which may be obtained with some effort, and the release of a spreadsheet compiled by ICE containing a variety of information about an individual including criminal convictions, status as an illegal immigrant, some information about that individual's current location, and the fact that he or she has not been deported" (footnotes omitted).

#Freedom of Information Act

New York Times Co. v. U.S. Dep't of Justice, 806 F.3d 682, 685 (2d Cir. 2015).

"We emphasize at the outset *** that the lawfulness of drone strikes is not at issue. This appeal *** primarily concerns whether documents considering such lawfulness must be disclosed." In this FOIA action, the district court had ordered disclosure of all or portions of documents and denied disclosure of others. The Second Circuit affirmed for the most part. It held, among other things: (1) The First Amendment right of access did not apply to sealed portions of the district court's ruling because the documents in issue were classified and (2) the district court was not required to make certain specific findings because that requirement arose only when a First Amendment right of access existed. The Court of Appeals also questioned the need for *ex parte* and *in camera* oral argument on appeal, including the Government's decision to bring to a closed *ex parte* hearing "personnel whose identity and affiliation it will not disclose to opposing counsel, who were excluded from the hearing." In this regard, the court set forth ground rules for the future. The court remanded for further consideration.

#Freedom of Information Act
#Miscellaneous

Nichols v. Sivilli, No. CIV. 2:14-3821 WJM, 2014 WL 7332020, (D.N.J. Dec. 19, 2014).

This was a Section 1983 action brought against a State judge and the court in which she sat. The judge had imposed a gag order in a divorce and child custody proceeding. The plaintiff Nichols sought to interview the husband but could not do so because of the order. The order was issued after the husband filed a class action in federal court that challenged the alleged failure of the State court system to provide adequate due process rights to parents and was interviewed by a news organization about his experiences. Among other things, the order prohibited the parties from discussing the proceeding on social media and directed the husband to remove information from his blog. The Section 1983 action was commenced after the husband failed to secure relief from the federal judge supervising the class action or the Appellate Division of the New Jersey Superior Court. In response to a Rule 12(b)(1) motion to dismiss, the district court in the Section 1983 action held that a "case or controversy" existed as to the State judge because she issued and could enforce the gag order. However, it dismissed as to the court on Eleventh Amendment grounds.

#Court Proceedings

Nieman v. Versuslaw, Inc., 512 Fed.Appx. 635 (7th Cir. 2013) (*per curiam*).

The plaintiff brought suit against the owners of "legal-search websites" for, among other things, invasion of privacy. He alleged that the defendants' search engines enabled prospective employers to locate documents related to a litigation he had brought against a former employer and that, as a result, he had been "passed over" for employment. The district court dismissed the complaint for failure to state a claim. The Court of Appeals affirmed, finding that, "The First Amendment privileges the publication of facts contained in lawfully obtained judicial records, even if reasonable people would want them concealed ***. The for-profit nature of the defendants' aggregation websites does not change the analysis; speech is protected even when 'carried in a form that is 'sold' for profit' ***. All of Nieman's claims are based on the defendants' republication of documents contained in the public record, so they fall within and are barred by the First Amendment privilege." The Court of Appeals distinguished an earlier decision, *Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222 (7th Cir. 1993), which concerned the publication of private facts not in the public record.

#Pleadings & Orders

Oklahoma Observer v. Patton, 73 F. Supp. 3d 1318 (W.D. Okla. 2014).

The plaintiff media organizations and journalists filed this action for declaratory and injunctive relief to challenge limitations imposed by the State on their ability to witness executions. The

court found that the plaintiffs had standing based on affidavits that established intent to observe a scheduling execution and rejected the State's reliance on Eleventh Amendment immunity because the plaintiffs sought prospective relief. The court then denied injunctive relief to the plaintiffs based on *Richmond Newspapers, Inc. v. Virginia* and *Press-Enterprise Co. v. Superior Court* because the qualified right of access did not expend to the implementation of a sentence under either the "logic" or "experience" tests. The court also rejected the plaintiffs' reliance on decisions that applied "First Amendment scrutiny to content-based regulations or limitations" as there were none in issue as well as their reliance on a "general [constitutional] right of public access to government information." The court granted a defense motion to dismiss but allowed the plaintiffs to amend (although it had ruled on their legal theories) and declined to exercise supplemental jurisdiction over State law claims.

#Miscellaneous

***Opis Mgmt. Res. LLC v. Sec'y Fla. Agency for Health Care Admin*., 713 F.3d 1291 (11th Cir. 2013).**

This appeal is about pre-emption. Under Florida law, nursing homes are required to disclose deceased residents' medical records to certain individuals. Under the Health Insurance Portability and Accountability Act ("HIPPA") such information may only be disclosed to the personal representative of the deceased. The Court of Appeals affirmed the district court's award of summary judgment in favor of the nursing homes, which faced conflicting obligations under federal and State law. In doing so, it referred to the express pre-emption language in HIPPA and the "unadorned text of the state statute [, which] authorizes sweeping disclosures ***."

#Miscellaneous

***Opperman v. Allstate New Jersey Ins. Co.*, 2008 WL 5071044 (D.N.J. Nov. 24, 2008).**

In this action challenging the defendant insurer's property loss estimates, the court ordered the production, in accessible form, of proprietary software owned by a nonparty and licensed to the insurer. The court found that the software was relevant to the plaintiff's claims and that an existing confidentiality order would protect the trade secret nature of the software. The court also rejected the proposition that a nonparty could prohibit the production of the software.

#Discovery Materials

***Paige v. Drug Enforcement Admin.,* 665 F.3d 1355 (D.C. Cir. 2012).**

The plaintiff, a federal agent, accidentally shot himself in the thigh while speaking at a school on gun safety. A member of the audience recorded the incident with the plaintiff's knowledge. The recording was later produced to the defendant. Subsequently, a four-minute portion of the

recording was aired on the Internet and within the DEA system. The plaintiff sued the defendant for violation of the Privacy Act and the Federal Tort Claims Act (FTCA). The district court granted summary judgment for the defendant and the plaintiff appealed. The Court of Appeals affirmed, finding no violation of the Privacy Act because the four-minute portion of the recording did not fall within the meaning of a "system of records" under the Privacy Act, which required that the recording be both retrievable by personal identifier and actually retrieved by personal identifier. The Court of Appeals similarly found that no violation of the FTCA occurred because the video did not contain private facts and the plaintiff's accidental discharge of a loaded weapon in a room of children was a matter of public concern.

#Miscellaneous

***Perfect Barrier LLC v. Woodsmart Solutions Inc.*, 2008 WL 2230192 (N.D. Ind. May 27, 2008).**

The plaintiff requested production of all emails matching a set of search terms, to which the defendant agreed and produced the equivalent of 75,000 pages of email in electronic format. The defendant also designated the entire production as "Type C" or "Attorney-Eyes-Only," pursuant to a protective order agreed to by the parties previously. The plaintiff objected to the production and moved to compel a supplemental production of the same material without the designation and in paper form. The magistrate judge, considering the terms of the protective order, found that it allowed for "Type C" designation of entire categories. The judge also found that the plaintiff failed to designate a particular form of production in its request, and that the defendant's choice to produce the email in reasonably useable native format was proper under Rule 34.

#Discovery Materials

***Perry v. Brown*, 667 F.3d 1078 (9th Cir. 2012).**

Same-sex couples brought action against public officials, challenging the state's voter-enacted constitutional amendment prohibiting same-sex marriage. The plaintiffs moved to unseal a video recording of trial. The recording was prepared for by the trial for in-chamber use and placed in the record under seal. The district court granted the motion and the defendants appealed. The Court of Appeals held that, assuming that a common law presumption of public access applied to the recording, there was a compelling reason overriding the common law right because the defendants had reasonably relied on the trial judge's specific assurances—compelled by the Supreme Court's just-issued opinion—that the recording would not be broadcast to the public, at least in the foreseeable future. The Ninth Circuit emphasized that the issue did not pertain to the "freedom of the press" or to "policy questions" regarding the "openness" of judicial proceedings. Instead, the question was "whether courts are required (or even free) to *give* to the media information that is not ordinarily available—and specifically whether a recording

purportedly made for the sole purpose of aiding the trial judge in the preparation of his opinion, and then placed in the record and sealed, may shortly thereafter be made public by the court."

#Court Proceedings

In re Posco, 794 F.3d 1372, 1374 (Fed. Cir. 2015).

The plaintiffs in this patent infringement and unfair competition action moved to modify a protective order to allow their counsel in foreign proceedings to have access to proprietary information of defendant. A special master allowed the modification under standards established in *Pansy v. Borough of Stroudsburg.* The district court affirmed the modification and the defendant sought *mandamus* relief. The Court of Appeals granted the writ, noting that the order "turns on claims of confidentiality that raise an important issue of first impression" and framing the question before it as the role of 28 U.S.C. Section 1782(a) "in the context of the request to modify this protective order." The court held:

> while [] 1782 may not govern instances in which a party seeks to modify a protective order to allow use of discovered materials in a foreign proceeding, we think the considerations articulated under [] 1782 and *Intel* [*Corp. v. Advanced Micro Devices, Inc*.] are relevant to that issue and must be considered together with other considerations pertinent under *** Rule *** 26 as articulated in *Pansy.*

The Federal Circuit vacated the modification order and remanded for the district court to "conduct the proper assessment giving due consideration to the *Intel* factors."

#Miscellaneous

Prison Legal News v. Executive Office for U.S. Att'ys, 628 F.3d 1243 (10th Cir. 2011) *cert. denied*, 132 S. Ct. 473 (2011).

In this FOIA action, the plaintiff sought disclosure of a "video depicting the aftermath of a brutal prison murder and autopsy photographs of the victim." The victim, a prisoner, was mutilated and murdered by two cellmates. After the video and photographs were introduced into evidence and shown in open court during the murderers' trials, the materials were returned to the United States Attorney's Office. The district court denied the plaintiff's request and the Court of Appeals affirmed. The Court of Appeals reasoned that the materials fell under Exemption 7(C), as these "could reasonably be expected to constitute an unwarranted invasion" into the personal privacy of the victim's family, which outweighed any public interest in disclosure. Further, use of the materials at trial was irrelevant to a waiver analysis. The Court of Appeals, however, also held that the district court had erred in withholding portions of an audio track containing statements by the murderers. Nevertheless, the court affirmed nondisclosure on 7(C) grounds given the privacy interests. Finally, the court rejected the plaintiff' argument that the "public domain doctrine" compelled disclosure: "Assuming the court was to recognize that doctrine, it would be

inapplicable under the facts as the purpose of Exemption 7(C) remained intact." Notably, the Court of Appeals did not address whether the materials were properly removed from the public record or should have been made available for copying.

#Freedom of Information Act

***Rocky Mountain Bank v. Google, Inc.*, 428 F. App'x 690 (9th Cir. 2011).**

The plaintiff bank filed action against the defendant email service provider for allegedly misdirecting email which disclosed confidential information. The district court issued an ex parte temporary restraining order against the defendant and its customer, and ordered the defendant to lodge a report with the court so that it could assess whether the defendant had complied with the temporary restraining order. The defendant's response satisfied the plaintiff and the action was dismissed. A media entity then intervened, filing a motion to access the compliance report submitted by the defendant. The motion was denied and the media entity appealed. The Court of Appeals reversed and remanded, holding that lodging, rather than filing, the compliance report with the court was not sufficient on its own to overcome the public's right to access. The court described the compliance report as a "quintessential" judicial document. Thus, absent some further determination, the public was entitled to access to the report.

#Dockets & Judicial Records

***Sanmedical Inter'l v. Amazon.com Inc.,* No. 13-cv-00169 (D. Utah Nov. 2, 2015).**

In this trademark infringement action, a professor moved to intervene under Rule 24(b) to seek "public access to redacted portions of this court's summary judgement opinion *** and the summary judgement record" to educate the public on an issue addressed in the opinion. Amazon reached agreement with the professor but the plaintiffs contested her motion, arguing that there was no common question of law or fact. The court found that the professor's interest in the redacted information, "founded in the public's common law right of access to judicial records," satisfied this requirement. Since the action had been closed the professor needed independent standing under Article III and the plaintiffs argued that she had none. However, because the professor alleged that "were it not for the protective order she would be able to gather the information from the public opinion and disseminate her opinion on it through her blog," and a favorable ruling would allow her to do so. she had established an injury in fact.
#Dockets & Judicial Records

#Pleadings & Orders

Sanofi-Aventis U.S. LLC v. Breckenridge Pharm., Inc., Civil Action No. 15-289 (MAS)(LHG) (D.N.J. Jan. 25, 2016).

The parties to this patent infringement had negotiated a two-tiered confidentiality order but could not agree on access by one in-house counsel of one party to certain materials designated by the other party as highly confidential. Applying a test set forth in *U.S. Steel Corp. v. United States,* 730 F.2d 1465 (Fed. Cir. 1984), the court found appropriate safeguards had been put into place to avoid an "unacceptable risk of inadvertent disclosure" because the attorney had been "functionally, geographically, and technologically isolated from his peers." The court also found that the party would be harmed because the attorney was in-house litigation counsel and needed access to give advice and participate in the litigation.

#Discovery Materials
#Miscellanous
#Pleadings & Orders

Smith & Fuller, PA v. Cooper Tire & Rubber Co., 685 F.3d 486 (5th Cir. 2012).

The district court ordered sanctions under Rule 37(b) in the amount of $29,667.71 against the plaintiff's attorney for violating a protective order. The lower court calculated the amount using a "lodestar" approach, which is based on the number of hours of additional litigation for the defendant, multiplied by the average rate for such work. On appeal, the plaintiff conceded to violating the order but contested sanctions on the grounds that such an action was outside the Court's authority, and that the amount imposed was unreasonable given the circumstances. The Court of Appeals affirmed, finding that Rule 37(b)(2) permitted sanctions for discovery matters because the protective order was written to regulate the discovery process. The Court of Appeals also found the sanctioned amount to be appropriate given the behavior of the plaintiff and nature of Rule 37.

#Discovery Materials

In re Special Proceeding, 842 F.Supp.2d 232 (D.D.C. 2012).

This miscellaneous action arose out of the investigation of federal prosecutors in *United States v. Stevens*. The court appointed a prominent attorney to investigate prosecutorial misconduct. The attorney filed a report under seal. Motions were filed to seal the report permanently. The court denied the motions, concluding: (1) "[T]he public has an overriding and compelling right to access the Report, and that right is protected by the First Amendment"; (2) [the attorney's] investigation differed in significant respects from a grand jury proceeding and was not bound by the grand jury secrecy rules, and the reasons underlying the secrecy of grand jury proceedings were not relevant to the case; and (3) the factors identified in *In re North*, 16 F.3d 1234 (D.C. Cir.

1994) were relevant to determining whether to publically release a special prosecutor's report overwhelmingly in favor of publically releasing the Report under the circumstances. The court directed the attorney to file his report on the public docket but allowed the objectors to submit objections or comments "to be published as addenda."

#Dockets & Judicial Records

***Suarez Corp. Ind. v. Earthwise Techs. Inc*., 2008 WL 2811162 (W.D. Wash. 2008).**

In a trademark infringement action, the defendant produced 55,000 emails, nine boxes of paper printouts of .pdf files, and 9 CDs of data in native format. The plaintiff objected to the production as an unorganized "data dump" that was neither organized or labeled to correspond to the categories of the requests, produced as kept in the normal course of business, nor produced in reasonably useable form. The court distinguished between a requesting party's right, under Rule 34, to request that electronically stored information be produced in a particular form or forms, and a demand by the plaintiff that the information be organized in a particular way. The court ordered the defendant to comply with the production requirements of Rule 34 and recommended that the parties work together to resolve any disputes. Further, the court declined the plaintiff's request to deem any objections the defendant may have to further discovery waived due to the failure of the defendant to fully respond within Rule 34's required 30 days, noting that both parties appear to be withholding further production until a confidentiality agreement can be reached and an appropriate protective order entered by the court.

#Discovery Materials

***In re Swift Energy Co.,* No. CIV.A. 13-5552, 2015 WL 1281043 (E.D. La. Mar. 20, 2015).**

This is a limitation of liability action arising out of a collision between a vessel and an oil well. The limitation petitioner sought discovery related to claims that claimants against it had asserted elsewhere. The claimants argued that a confidentiality order issued in other litigation barred production. The court found the information sought was relevant and not privileged and rejected the argument that the protective order barred production. However, the court noted that the information was "sensitive" and ordered that the petitioner could "only use those documents for the purposes of this litigation and may not use those documents for any other purpose."

#Discovery Materials

United States v. Bonds, 2011 WL 902207 (N.D. Cal. 2011).

Here, the district court established a procedure to make completed juror questionnaires available to the public and the press during the jury selection process. The court also took steps to protect juror privacy and the defendant's right to a fair trial.

#Court Proceedings

United States v. Business of Custer Battlefield Museum & Store Located at Interstate 90, Exit 514, 658 F.3d 1188 (9th Cir. 2011).

After the Government terminated its criminal investigation of the defendant without bringing charges, the defendant sought disclosure of search warrant applications and supporting affidavits. Citing generalized privacy interests of third parties, the Government sought to limit dissemination of the papers to the defendant's personal review and to restrict inclusion of the papers in any future court filings. The defendant argued that the search warrant papers should be unsealed as "presumptively public judicial records." The district court granted defendant's request but limited his access in accordance with the Government's suggestions. The defendant appealed. The Ninth Circuit held that a qualified common law right of access applied to post-investigation warrant materials, and concluded that the restrictions placed on the defendant's access were not supported by compelling reasons. The Ninth Circuit declined to consider the right of access under the First Amendment. The order was vacated, and the case was remanded for reconsideration of the application of the common law right of access.

#Dockets & Judicial Records

United States v. Christie, 717 F.3d 1156 (10th Cir. 2013).

In this appeal from a conviction for second-degree murder and child abuse resulting from the death of her 3-year-old daughter, the defendant challenged, among other things, the trial court's decision to exclude her former husband from the courtroom during the testimony of his 10-year-old daughter as a violation of the defendant's Sixth Amendment right to a public trial. Distinguishing the stringent test of *Waller v. Georgia,* 467 U.S. 39 (1984), as being applicable to a *total* closure of a trial, the Court of Appeals affirmed: (1) There was only a partial closure as to one person while a single witness testified; (2) a partial closure required a "substantial" interest, which could be met by the interest in safeguarding the physical or psychological well-being of a minor; (3) the record demonstrated that the district court had been correct in her assessment of the need for the partial closure to protect the 10-year-old girl's psychological well-being; and (4) no underlying Sixth Amendment interest had been impaired.

#Court Proceedings

United States v. Dougherty, No. 14-3498, 2015 WL 574142 (3d Cir. Feb. 12, 2015).

The appellant's home had been searched by the FBI pursuant to a warrant and supporting affidavit had been sealed by a magistrate judge. Thereafter, another individual ("no familial relation to the Appellant") was indicted. The Government filed a brief in that criminal action to which the affidavit was inadvertently attached. The affidavit remained publically accessible for nearly five years until an order directed it be "removed from the file." While the affidavit was public the appellant filed a defamation action in State court against a newspaper and several employees. They moved for summary judgment and attached the affidavit. The State court provisionally sealed the affidavit until it granted the motion, at which time it unsealed the affidavit. The appellant did not appeal the unsealing. The appellant then sought an injunction in the federal criminal action directing the State court to seal the affidavit, which was denied. The Court of Appeals affirmed: The Anti-Injunction Act barred the relief sought because the State unsealing order did not impair the ability of the federal court to decide the criminal action and the district court's order to "remove" the affidavit did not preclude the State unsealing order. Moreover, even if the Act applied, the lengthy public availability of the affidavit and the appellant's failure to appeal the State unsealing order suggested no irreparable harm and therefore the court had not abused its discretion in denying injunctive relief. The Court of Appeals also rejected the appellant's reliance on *Pansy v. Borough of Stroudburg.*

#Dockets & Judicial Records
#Miscellaneous

United States ex rel. Holmes v. Northrup Grumman Corp., No. 13-cv-85 (S.D. Miss. June 3, 2015).

Northrup Grumman made claims against an insurance policy for damages caused by Hurricane Katrina. The insurer was represented by an attorney, Gerald Fisher. Fisher entered into a confidentiality agreement with Northrup Grumman for the use of its documents in the adjustment process. Thereafter, Northrup Grumman and the insurer commenced arbitration proceedings in England. The insurer was represented by Fisher and another attorney, Donald Holmes. These attorneys secured an order from the United States District Court for the District of Columbia for the production of documents from the Navy "purportedly for use" in the arbitration under a stipulated protective order. Fisher withdrew and Holmes filed an amended complaint in which he alleged that he had "properly gained access" to information that established the claim against Northrup Grumman. After Northrup Grumman moved to disqualify Holmes as the relator and to dismiss because of Holmes' alleged ethical violations, he admitted that he had violated the stipulated protective order but that it was not entitled to be

accorded "a court order." The court granted the relief sought: (1) The False Claims Act did not preempt Holmes' ethical obligations; (2) the court would consider Holmes' conduct under the District of Columbia ethics rules as well as the ABA model rules; (3) Holmes violated his duty of candor to the courts in both the District of Columbia and Mississippi by statements he had made as to the Navy documents; (4) Holmes breached his duty of loyalty to the insured by representing it while prosecuting the *qui tam* by taking conflicting positions and he did not have the insurer's "informed consent" to do so; (5) Holmes violated his duty of confidentiality by using information related to his representation of the insurer in the *qui tam* action; and (6) Holmes knowingly violated the stipulated confidentiality order. All of this required his disqualification and the dismissal of the complaint "because the case would be tried on a record developed primarily through the fruits of Holmes' unethical conduct." Dismissal, however, was without prejudice to any rights of the United States.

#Discovery Materials
#Miscellaneous

United States ex rel. Steel Erectors, Inc. v. AIM Steel Internat'l, Inc., **No. CV415-208, 2016 WL 53881 (S.D. Ga. Jan. 4, 2016).**

The plaintiff in this *qui tam* action moved to compel the defendant to supplement its corporate disclosure statement to name the defendant's foreign parent. In response, the defendant moved to seal. The court denied the motion, finding that the defendant's "anti-competitive business interests" did not outweigh the right of access. However, the court denied the plaintiff's motion to compel the defendant to disclose contact information for the parent because that information was neither relevant nor proportional. Note that the defendant apparently sought to "shield its statement from plaintiff" as well as the public.

#Dockets & Judicial Records

United States v. HSBC Bank USA, S.A., **12-CR-763 (JG) (E.D.N.Y. Jan. 28, 2016).**

A monitor was appointed as part of a deferred prosecution agreement to supervise HSBC's implementation of remedial measures and compliance with laws under which it had been charged. After the monitor issued a report the Government filed a status report that purportedly summarized the monitor's conclusions. The court ordered the Government to file the monitor's report, which it did under the seal. The monitor asked that his report be unsealed. The court found that the monitor's report was a "judicial document" as it was directly relevant to the judicial function. The court then applied the "experience and logic" test and concluded that both prongs supported a First Amendment right of access to the report.

However, the court ordered redaction of identifying information of HSBC employees, "information detailing the processes by which criminals could exploit HSBC," and information that would "negatively affect the Monitor's relationship with foreign regulators," and information involving foreign regulators.

#Dockets & Judicial Records

United States v. Kravetz, 706 F.3d 47 (1st Cir. 2013).

In criminal prosecution for scheme to defraud restaurant franchisor, journalist moved to make public various documents filed under seal in the case, including sentencing memoranda and sentencing letters submitted by third parties on defendant's behalf. The district court denied her motion and the journalist appealed. The Court of Appeals held that the sentencing documents constituted judicial documents subject to the common law presumption of public access. The sentencing memoranda was relied upon by the court in determining an integral phase of criminal prosecution, and public access to such materials served as a check against an arbitrary or disproportionate sentence, promoted accurate fact-finding, and stimulated public confidence in the criminal justice system. Further, the sentencing letters—which were expressly referenced in the sentencing memoranda—were central to, and served as an evidentiary basis for, the defendant's arguments for leniency. The Court of Appeals vacated and remanded, directing the district court to make particularized findings to support the sealing of sentencing documents.

#Dockets & Judicial Records

United States ex rel. Martin v. Life Care Ctrs. of Am., 912 F.Supp.2d 618 (E.D. Tenn. 2012).

The plaintiff filed a *qui tam* complaint in October 2008, pertaining to herself, the state of Tennessee, and the United States. The court entered a Sealed Order that same month for sixty days. The United States Government then requested three extensions between January 2009 and December 2010, the last of which was granted indefinitely. In September 2012, at a consolidation hearing to discuss this and a similar case, local media source, the Chattanooga Publishing Company (CPC), became aware of the case and moved to intervene to prevent the records from remaining under seal. Tennessee declined to intervene entirely, but the Government opted to intervene in part, and eventually produced an amended motion to unseal some of the documents related to the case. Other components of its investigation, however, it requested to remain sealed. The court granted the Government's motion to consolidate and also CPC's motion to intervene for the purpose of opposing the Government in maintaining the case under seal. With regard to the Government's continuous extensions in this case, the court placed the Government on notice that such behavior was inappropriate, and that future requests to extend the minimum sixty day seal period for *qui tam* suits would require extensive justification. The reason for this

castigation was the balancing of the Government's interest, identifying what *qui tam* suits it would participate in and the ability to briefly investigate a defendant without their knowledge, and the public's access to court documents to maintain accountability in the judicial system. Finally, the Court found the Government's request to retain sealed documents unreasonable. It was denied. However, unsealing of the entire proceedings was stayed until November 30, 2012, and the court gave the Government until November 26, 2012, to request seal retention on specified documents, keeping in mind the new policies regarding *qui tam* sealed periods.

#Court Proceedings

***United States v. Jenkins*, 2012 WL 5868907 (E.D. Ky. 2012).**

In this First Amendment case, the newspaper moved to intervene, to set aside a statute's prohibition of contact with jurors, for access to juror names and addresses, and for an order of the court to release information of willing jury members from *United States v. Jenkins,* and to permit contact with them. The newspaper argued that the statute, which allows courts to limit interaction with jurors, was unconstitutional because of its burden on the First Amendment. The district court denied all of the newspaper's motions except its motion for an order of the court to release the information of willing members of the jury and to permit contact with willing jurors. The court reasoned that the statute did not provide a blanket rule prohibiting jurors from speaking to the media. The district court stated that it would contact the jurors in writing to inform them of their right to refrain from speaking with the media, and if they were willing to speak to the media and communicated that willingness to the court, the court would provide their information to the newspaper.

#Court Proceedings

***United States v. Swartz,* 945 F.Supp.2d 216 (D. Mass. 2013).**

The defendant in this criminal action had been indicted for allegedly attempting to download certain archived materials through an MIT computer network. He committed suicide, and the charges were dismissed. Between the indictment and the dismissal, the district court barred the defendant from disclosing documents discoverable under Criminal Rule 16 to anyone other than potential witnesses. After the suicide, media interest "escalated," and a congressional investigation commenced. Threats and harassing incidents, including hacking, occurred. The defendant's estate moved to modify the protective order pursuant to Criminal Rule 16(d) to allow it to release documents to Congress and the public. The victims of the defendant's alleged crimes intervened to oppose modification. The Government, the estate, and the victims agreed that some modification was appropriate but disputed whether names and identifying information of certain individuals, including law enforcement personnel, should be disclosed.

The district court held that: (1) It was "appropriate to analyze the 'good cause' requirement [to modify a protective order] under the criminal rules in light of precedent analyzing protective

orders in civil cases"; (2) the interests of the third-party victims bore "particular emphasis"; and (3) the presumptive right of access did *not* attach to criminal *discovery* materials. Applying the "good cause" test, the district court found that, "the estate's interest in disclosing the identity of individuals named in the production, as it relates to enhancing the public's understanding of the investigation and prosecution ***, is substantially outweighed by the interest of the government and the victims in shielding their employees from potential retaliation." The district court also allowed MIT to redact information related to weaknesses in its computer network and modified the order so that the estate could, "disclose discovery materials in its possession after redaction of the identity of individuals and sensitive network information."

#Discovery Materials

***Walgren Company v. Schlage Lock Co*., (N.D. Ind. 2011).**

The court denied a proposed stipulated protective order submitted by the parties pursuant to FRCP 26(b), finding the proposed order overbroad, and thus failed comply with FRCP 26(c)(7) and established Seventh Circuit precedent. The court observed that when parties choose to resolve their disputes in court, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. Thus, if the parties in this case had desired to keep such non-confidential information secret, they should have opted for arbitration instead.

#Discovery Materials

***In re The Wall St. Journal,* 601 F. App'x 215 (4th Cir. 2015).**

In a high profile criminal action, the district court issued *sua sponte* a sweeping order that restricted access to the docket and prohibited extrajudicial statements a day after the grand jury returned the indictment. News organizations intervened and challenged the order. The district judge allowed intervention and make some modifications but, in essence, maintained the restrictions and prohibition. The organizations petitioned the Court of Appeals for *mandamus* relief which was granted: The qualified right of access to criminal trials could be overcome only by specific findings of a substantial probability that the defendant's right to a fair trial would be prejudiced absent restrictions and that there were no reasonable alternatives. There were none.

#Court Proceedings
#Dockets & Judicial Records

***Williams & Connolly v. SEC,* 662 F.3d 1240 (D.C. Cir. 2011).**

In this FOIA action, a law firm sued the SEC to compel production of documents the SEC withheld

during the law firm's representation of a client convicted of securities fraud. Specifically, the law firm sought *in camera* review of notes taken by SEC staff members during their conversations with two witness and their attorneys. The SEC refused to disclose the notes, citing Exemption 5. During trial, however, the DOJ agreed to disclose thousands of documents to the law firm, including some sets of withheld SEC notes. The district court denied the law firm's request and granted the SEC's motion for summary judgment. The Court of Appeals affirmed, holding that prior disclosure of some sets of withheld SEC notes by the DOJ rendered moot the law firm's FOIA claim as to those notes. The Court of Appeals specified, however, that disclosure by the DOJ did not waive SEC's work product protection in the undisclosed sets of notes, which could be withheld pursuant to FOIA. The Court of Appeals also noted that *in camera* review was

unnecessary to determine whether the withheld information could be used for a collateral attack on its client's conviction or used as part of the client's defense.

#Freedom of Information Act

***Wiles v. Ascom Transp. Sys., Inc*., 478 Fed.Appx. 283 (6th Cir. 2012).**

The plaintiffs, Kentucky residents holding drivers' licenses issued by Kentucky, appealed from the dismissal of the action brought by them against the defendant for violation of the Driver's Privacy Protection Act. The plaintiffs argued on appeal that the defendant had misrepresented that it had a permissible purpose for obtaining their personal information from motor vehicle records. Affirming the dismissal, the Court of Appeals held that "bulk obtainment of personal information for a permissible purpose" does not violate the Act, that the Act did not require immediate use of information, and that obtaining information for the purpose of reselling it did not violate the Act. The Court of Appeals also held that the plaintiffs did not have a reasonable common law expectation of privacy in information which could be disclosed pursuant to the Act, that the plaintiffs had not alleged "unreasonable publication" sufficient to state a claim for invasion of privacy, and that the plaintiffs had not alleged a violation of a *federal* right sufficient to give rise to a Section 1983 cause of action.

#Miscellaneous

***World Pub. Co. v. USDOJ*, 672 F.3d 825 (10th Cir. 2012).**

Under FOIA, the plaintiff requested photos of six detainees from the United States Marshals Service (USMS). The USMS refused under Exemption 7(C), citing the personal privacy rights of the detainees. The district court denied the plaintiff's request. The Court of Appeals affirmed, reasoning that the potential effect of a booking photo—the format of which is widely known as well as its association with possible criminal activity—was sufficient to deem the distribution of such photos an invasion of personal privacy. While the Court of Appeals acknowledged that the public may have had an interest in the photographs, the public's interest was outweighed by the

personal privacy rights of the six individuals.

#Freedom of Information Act

***Yonemoto v. Department of Veterans Affairs*, 686 F.3d 681 (9th Cir. 2012).**

A federal employee filed a FOIA action against the Department of Veterans Affairs ("VA"), seeking the disclosure of emails that contained personnel and medical information. After extensive litigation, the VA offered to produce unredacted copies of 157 disputed emails in his capacity as a VA employee. The VA also withheld redacted portions of 12 other documents under FOIA Exemption 6, which allows an agency to withhold certain personnel, medical, and similar files that would clearly constitute an unwarranted invasion of personal privacy. Following *in camera* review of withheld emails, the district court held that the VA's offer to give the 157 emails to the employee in his capacity as an employee mooted his FOIA claim to those documents, and the redacted portions of the remaining 12 emails were properly withheld under Exemptions 2, 5, and 6. The Court of Appeals ruled that the VA's offer to release the records to the employee in his capacity as a VHA employee meant that the VA was attempting to put restrictions on the use of the records, and that the VA was still withholding the requested records. With regard to the redacted portions withheld under Exemption 6, the Ninth Circuit held that categorical privacy determinations were "only in those circumstances in which disclosing a *type* of record defined by its *content,* such as an identifiable individual's rap sheet, will invariably result in an invasion of personal privacy."

#Freedom of Information Act

State Decisions

ACLU of Iowa v. Records Custodian, 808 N.W.2d 449 (Iowa Ct. App. 2011) (unpublished table decision), *aff'd,* 818 N.W.2d 231 (Iowa 2012).

A civil liberties group filed a petition seeking an injunction ordering the school district to comply with its request for information, pursuant to the Open Records Act, pertaining to the discipline imposed on two school employees after an alleged "locker room strip search" was conducted on five female students at school. The district court granted summary judgment in favor of the defendant, finding the disciplinary records exempt from disclosure under the state's open records laws. The group appealed, arguing that the district court failed to apply a balancing test to determine whether disclosure was appropriate. The appellate court affirmed, rejecting plaintiff's argument. The court found that because defendant's disciplinary records were "job performance records" and unrelated to "final disciplinary actions," they were confidential and exempted from disclosure. On appeal, the Supreme Court held that disciplinary records and information regarding discipline were exempt from disclosure under the Act as "nothing more than in-house job performance records or information."

#State FOIA

Amis v. Greenberg Traurig LLP, 235 Cal. App. 4th 331,185 Cal. Rptr. 3d 322 (2015).

The plaintiff filed suit against his former law firm, alleging that the firm had caused him to enter into a settlement without advising him that he had little or no risk of personal liability. The defendant moved for summary judgment and cited the plaintiff's admission that all advice he received had been given during mediation. The firm argued that the plaintiff could not obtain evidence to support his claims and that the firm could not produce evidence to defend itself because of California's mediation confidentiality statutes. The trial court granted summary judgement and the Court of Appeal affirmed because the statutes barred the plaintiff from presenting critical evidence. The Court of Appeal also rejected the plaintiff's attempt to draw an inference that would create a triable issue of fact because that would allow him to "accomplish indirectly what the statutes prohibit him from doing directly."

#Miscellaneous
#Settlement

Apple, Inc. v. Superior Court, 56 Cal.4th 128, 292 P.3d 883 (2013).

In this putative class action, the California Supreme Court interpreted the Song-Beverly Credit Card Act to be inapplicable to transactions which involved the alleged collection of personal identifiers as a condition of the use of credit cards to purchase electronically downloadable

products over the Internet. The court distinguished *Pineda v. Williams-Sonoma Stores, Inc.*, which also interpreted the Act, as being limited to "the purchase of a physical product at a traditional 'brick-and-mortar' business." The court did note, however, that the Legislature was free to amend the Act to reach the electronic transactions.

#Miscellaneous

***Arpaio v. Davis*, 221 Ariz. 116, 210 P.3d 1287 (Ct. App. 2009).**

A county sheriff submitted a judicial records request to the county court administrator seeking "thousands of random, unidentified electronic messages (e-mails) and documents, without regard to subject matter, sent to or from certain individuals" within a time period that extended over one month. The sheriff made subsequent requests, omitting more specific information requested by the court to aid in the fulfillment of plaintiff's records request. The court administrator denied the requests due to the unreasonable expenditure of resources and time required to review nearly 16,000 emails. The sheriff then filed a formal request for administrative review with the court. At the review, the judge reviewed hard copies of certain e-mails and CDs containing other requested e-mails. The judge was also given access to the offices of other named assistants in order to review original copies of requested materials "too voluminous to copy." After reviewing some of the records *in camera,* the judge observed that the request for administrative review was untimely and could be rejected for that reason alone, but nonetheless conducted a review on the merits and upheld the denial of the judicial records request. The sheriff filed a petition for special action review pursuant to a Supreme Court of Arizona rule. The appellate court held that the sheriff's request for administrative review was untimely as matter of law and subject to being barred for that reason alone. Even if the request had been timely, however, the trial judge did not abuse his discretion in finding that review of the requested materials would require unreasonable expenditure of resources and time.

#Miscellaneous

***Bainbridge Island Police Guild v. City of Puyallup*, 172 Wash. 2d 398, 259 P.3d 190 (2011).**

Various citizens filed suit in various counties seeking disclosure of a criminal investigation report and an internal investigation report regarding allegations of sexual assault against a police officer. The police officer and the police union sought to enjoin disclosure, citing the state public records statute. The lower courts ruled that that the reports were statutorily exempt from disclosure as personal information. The citizens seeking the reports appealed. Upon consolidating appeals, the Washington Supreme Court reversed and remanded, instructing the state to redact the officer's identity and produce the remainder of the reports. Despite the fact that the officer failed to prevent the production of the reports to newspaper reporter, the court stated that it did not mean he was forever prohibited from protecting his right to privacy in regards to disclosure of

the reports to other individuals. While the officer's name was deemed statutorily exempt from disclosure, the remainder of the investigation reports concerning the allegation was not exempt. The court held that the public did not have a legitimate interest in the name of a police officer subject to an unsubstantiated allegation of sexual misconduct; the public did, however, have a legitimate interest in knowing how police departments responded to and investigated such allegations.

#State FOIA

Bennett v. Smith Bundy Berman Britton, PS, 176 Wash.2d 303, 291 P.3d 886 (2013).

In what began as a marriage dissolution action, an accounting firm was sued and, during discovery, produced tax records of nonparties. The parties stipulated to a confidentiality order that provided, among other things, that the tax records could be used in motions, etc., only if filed under seal. The firm moved for summary judgment and the trial court ordered that documents be filed under seal. After opposition papers were filed, but before the court had considered the motion, the action settled. After the settlement, the parties realized that the opposition papers inadvertently included materials that should have been filed under seal and agreed to file redacted and sealed versions of those papers. The plaintiffs' expert then moved to intervene, seeking access to everything filed under seal. The trial court allowed the intervention but denied to unseal the documents. The court of appeals affirmed, as did the Washington Supreme Court. Interpreting the Washington State Constitution, the court held that "the act of filing a document does not alone transform it into a public one" and that "information does not become part of the judicial process is not governed by the open courts provision." Here, the sealed documents were not relevant to a decision and there was no presumption of public access. Instead, a five-part balancing test would govern. The Washington Supreme Court remanded to apply that test.

#Dockets & Judicial Records

Billings Gazette v. City of Billings, 362 Mont. 522, 267 P.3d 11 (2011).

A newspaper brought this declaratory judgment action against the city, seeking the disclosure of a letter from police captain to former police department employee detailing evidence gathered in the investigation of former employee's alleged misuse of a city credit card. The trial court denied the city's motion for summary judgment, granted summary judgment to the newspaper, and ordered disclosure of the letter. The city appealed. The Montana Supreme Court affirmed, holding that the letter was a public document subject to disclosure under a "right to know" provision of the state constitution and the state's freedom of information act. The Court found that the former employee did not have reasonable expectation of privacy in the letter sufficient to shield the letter from disclosure. Acknowledging that disclosure of the letter could taint the

criminal investigation of the former employee, the Court nevertheless concluded that this factor alone did not shield the letter from disclosure.

#Dockets & Judicial Records

Casa W, LLC v. Superior Court, No. B256155, 2014 WL 6467231 (Cal. Ct. App. Nov. 19, 2014).

This action arose out of a dispute involving the management of property owned by an LLC. In aid of litigation, the plaintiffs (members of the LLC) sought discovery of financial records, including tax returns, from the LLC as well as an LLC that owned adjacent property. The only member of the nonparty LLC was the defendant. The trial court eventually granted the plaintiffs' request for the records and the defendant took an interlocutory appeal. The Court of Appeal accepted the appeal because the order could undermine a privilege against the forced disclosure of tax returns in "civil discovery proceedings" established by the California Supreme Court and reversed the order, which the Court of Appeal characterized as having "materialized out of thin air" because no subpoena had been served on the nonparty, no discovery demand had been made on the defendant for production of the nonparty's returns, and a court-appointed expert was not authorized to conduct discovery. The Court of Appeal held that the trial court had failed to address any exception to the privilege in ordering production, one of which might arise from "[r]epeated discovery abuse that precludes a party from obtaining discoverable financial information by alternative means" but there was no such finding.

#Discovery Materials

State ex rel. The Cincinnati Enquirer v. Hunter, 2014 Ohio. St.3d 51 (Sup. Ct. 2013).

This is an unusual civil contempt proceeding. The appellant is a juvenile court judge. After she prohibited the appellant newspaper from access to a hearing for violation of her order which barred media from publishing the full names of the juvenile defendants and their parents the intermediate court of appeals ordered the judge to allow access and stayed enforcement of the name restriction. At a subsequent hearing, the judge allowed the newspaper access but only under various conditions. The appellate court found the judge in civil contempt for failure to comply with its order but granted a stay to allow the judge to appeal. The Ohio Supreme Court affirmed the contempt.

Note: Several other decisions have addressed restrictions that the trial judge imposed on the press. These are: (1) *State ex rel. Cincinnati Enquirer v. Hunter*, 2013-Ohio-4459 (Ct. App. 2013) (issuing *writ of mandamus* to compel judge to release unredacted court records of all cases before her in 2012 on finding that judge "failed to present clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest"); (2) *State* ex rel.

Cincinnati Enquirer v. Hunter, 2013-Ohio-4567 (Ct. App. 2013) (denying writ of prohibition absent evidence that judge "is about to exercise her judicial power to deny access to the media and public without a closure hearing ***"); (3) State *ex rel. Scripps Media, Inc. v. Hunter*, 2013-Ohio-5895 (Ct. App. 2013) (granting writ of prohibition "to prevent Judge Hunter from enforcing the access and reporting restrictions without conducting an evidentiary hearing and making the required findings"). The Supreme Court decision, and decisions (2) and (3) in this Note, all apply to a delinquency proceeding which "generated considerable public interest."

#Court Proceedings

***City of Champaign v. Madigan*, 372 Ill.Dec. 787, 992 N.E.2d 629 (Ill. App. Ct. 2013).**

At issue here was whether "communications relating to city business to and from individual city council members, on their personal electronic devices, constituted public records" and were subject to access under the Illinois Freedom of Information Act. The Attorney General of Illinois had issued a binding opinion that concluded that such communications were "public records" as defined by the Act. Interpreting the Act, the appellate court held that, "communications 'pertaining to public business' and sent to and from individual city council member's personal electronic devices during the time city council meetings (and study sessions) were convened" met the statutory definition and, after administrative review for exempt information, should be released. The court noted the Preamble to the Act, which stated that, "technology may advance at a rate that outpaces its ability to address those advances legislatively," urged the State legislature to explicitly address the issue, and encouraged local governments to, "consider promulgating their own rules prohibiting *** members from using their personal electronic devices during *** meetings."

#State FOIA

***City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010).**

The plaintiff made a Public Information Act request of the state that was vague. The state responded in good faith requesting clarification from the plaintiff. Plaintiff narrowed his request and the state provided the majority of the requested documents, withholding two that allegedly fell under attorney-client privilege. The state then requested that the attorney general provide an opinion on those two documents. The attorney general believed that, because more than ten days had passed since the original request, a time-frame permitted by the law that allows the state to seek legal guidance from the attorney general, the statutory presumption in favor of the documents being public record required their release. The state then brought suit seeking a declaratory judgment. The trial and appellate courts held that the ten-day provision began on the plaintiff's original date of request for the records. The Texas Supreme Court reversed. In instances where the state makes a good faith effort to clarify what is being requested, as was the

case here, the ten-day provision to seek an attorney general opinion does not commence until the date of the receipt of the clarified request. This, the court held, was not contrary to the legislative intent behind the law and served the public by ensuring that public information requests were fulfilled in a meaningful manner.

#State FOIA

City of Riverdale v. Diercks, 806 N.W.2d 643 (Iowa 2011).

Residents, pursuant to the state's FOIA, requested a city hall security video of a confrontation with the mayor over an earlier records request at the city clerk's counter. The city refused and sought a declaration that the videotape was confidential and thus exempt from disclosure. The city further argued that disclosing the contents of the videotape would jeopardize security at city hall. Residents counterclaimed, seeking an order compelling disclosure of videotape and payment of all attorney fees and costs. After the mayor showed the video to a reporter, the city's counsel advised the mayor not to show the video to others in light of the city's position that the video was confidential. The district court ordered disclosure of the videotape and also ordered the city to pay the residents' attorney fees. Both parties appealed and the court of appeals reversed, and vacated the attorney fee award. The Iowa Supreme Court granted the residents' application for further review. The court held that the trial court did not abuse its discretion in awarding attorney fees without a finding of bad faith on part of the city and did not err in rejecting the city's advice-of-counsel defense at trial. Thus, the court vacated the court of appeals' decision, affirmed the district court's award of attorney fees to residents and remanded.

#State FOIA

Commonwealth v. Pon, 469 Mass. 296 (2014).

Since 1973, Massachusetts law allowed records of criminal defendants whose cases had been subject to *nolle prosequi* or dismissal to be sealed if "substantial justice would best be served." In 1995, the Supreme Judicial Court adopted a "stringent" standard for the exercise of judicial discretion if sealing was sought. Thereafter, the Massachusetts Legislature amended the law to extend access to records "for limited use" while "simultaneously broadening the scope of the sealing provisions to enable more individuals to shield their records from public view." With this background, the Court revisited the standard. It held that the records were not subject to the First Amendment right of access under the "experience and logic" test. However, the records were "judicial" and subject to the common law right of access. The Court declared that "good cause" was the appropriate standard for sealing orders and directed judges to balance the right of access with privacy interests.

#Dockets & Judicial Records

Court of Common Pleas of Lackawanna Cnty. v. Pennsylvania Office of Open Records, 2 A.3d 810 (Pa. Commw. Ct. 2010).

The Court of Common pleas brought action seeking a declaratory judgment stating that the Office of Public Records ("OOR") did not have the right to release information that pertained to court employees or court documents stored on county-provided equipment. The Court of Common Please also requested a declaration that the OOR lacked jurisdiction over requests seeking such information and injunctive relief permanently enjoining the OOR and county from ordering release, or releasing, such requested information. The Commonwealth Court held that the records of the director of the office of domestic relations—"an administrative staff employee"—constituted records of a judicial agency that were not subject to the jurisdiction of the OOR, even though director was paid by the county, and county had access to director's emails because it provided the court computer system. Thus, the OOR order granting the records request and ordering the release of information constituted a blatant and unconstitutional violation of the separation of powers doctrine.

#Dockets & Judicial Records

Denver Post Corp. v. Ritter, 230 P.3d 1238 (Colo. Ct. App. 2009) *aff'd,* 255 P.3d 1083 (Colo. 2011).

Interpreting the Colorado Open Records Act, the Court held that the personal cell phone billing statements of the governor were not a "public record." Although the governor used his cell phone for official business, there was insufficient proof that the governor "made, maintained, or kept" the bills in his official capacity: (1) The bills were made by a service provider which determined what calls would be listed on the bill; (2) the governor did not "maintain" the bills for any reason other than personal ones; and (3) the governor only kept the bills for personal reasons. The appellate court also denied leave to amend, concluding that any amendment would be futile.

#State FOIA

Drinker Biddle & Reath LLP v. Department of Law & Pub. Safety, 421 N.J. Super. 489, 24 A.3d 829 (N.J. App. Div. 2011).

The plaintiff challenged the state's denial of his request for transcripts of unfiled depositions in the state's underlying environmental lawsuit against a refinery operator. The plaintiff alleged violations of the state's open records law, the common-law right of access, and the federal and state constitutions. The plaintiff argued that the transcripts were government records subject to access under state's open records law in the absence of a confidentiality order, and that state law did not exclude unfiled discovery documents from access. The plaintiff also argued that case law supported access, and that the state had failed to demonstrate that the legislature intended to exclude unfiled discovery documents from the state's open records law. The trial court

dismissed the plaintiff's claims, and the plaintiff appealed. The appellate court held that the records were statutorily exempt from disclosure under state law as unfiled discovery. A three-step balancing test, however, was required under common law to determine whether the transcripts were accessible. In this case, the trial judge merely stated that unfiled discovery is not accessible and failed to carefully evaluate plaintiff's asserted public interest or whether the transcripts were relevant to the vindication of that public interest. Accordingly, the court reversed and remanded for the court to conduct the appropriate common-law balancing test.

#Discovery Materials

In re Enforcement of a Subpoena, 463 Mass. 162, 972 N.E.2d 1022 (2012).

The petitioner in this judicial disciplinary proceeding before the Commission on Judicial Conduct moved for a protective order against a subpoena that, "plainly and admittedly direct *** [him] to produce notes and other material concerning his decision-making in cases over which he presided." The motion was reported without decision to the Supreme Judicial Court. After canvassing the law of other jurisdictions and considering the policy reasons behind it, the court recognized the judicial deliberative privilege: "This absolute privilege covers a judge's mental impressions and thought processes in reaching a judicial decision, whether harbored mentally or memorialized in other nonpublic materials." The court, in recognizing the privilege, noted that, "[t]here are multiple sources of primary information, available to the public and the commission on the basis of which judicial conduct and outward expressions of potential partiality can be assessed. Accessing these sources does not require intrusions into the deliberative processes of judges." The court remanded for the issuance of a revised subpoena.

#Miscellaneous

Freedom Found. v. Gregoire, 178 Wash.2d 686, 10 P.3d 1252 (2013) (*en banc*).

In this action brought under the Public Records Act, the plaintiff organization brought suit to compel production of certain documents after the governor had asserted executive privilege. Relying in part on *United States v. Nixon,* 418 U.S. 683 (1974), the Washington Supreme Court held that the separation of powers doctrine gave rise to a qualified executive communications privilege that served as an exemption from the Act. The court then reviewed the record before the trial court, which included a privilege log and letter that explained the log, noted that the plaintiff had refused to make any effort to rebut the presumption against production created by the privilege, and affirmed the trial court.

#State FOIA

Galloway v. Town of Hartford, 192 Vt. 171, 57 A.3d 684 (2012).

A journalist requested records relating to the police's response to a possible burglary in progress. The police used considerable force in restraining the suspect, who turned out to be the

homeowner. The police chief and town manager denied the request, claiming the records related to a criminal investigation, and thus, were protected from disclosure under "exemption five" of the state's public records act. The journalist filed an action against the town to compel production of the records. The trial court concluded that the records created by police were exempt from disclosure under the state's public records act "because they were created during the course of an investigation into suspected criminal activity." Because the investigation was terminated without any resulting criminal charges, however, the court held that "any records created after the decision that there would be no criminal charges had to be disclosed." The trial court reasoned that "the records revealing the outcome of an investigation are not records 'of the investigation,' but are its product." The journalist objected to this decision on the grounds that it contravened the purposes of the public records act, and that the criminal investigation ended when the handcuffs were removed from the suspect. The trial court declined to modify its decision and the journalist appealed. The Vermont Supreme Court reversed, holding that the homeowner was subjected to a de facto "arrest," requiring the disclosure of "all records considered by the trial court that were identified by the police as being generated as a result of the incident." The Court found "exemption five" inapplicable because the town failed to demonstrate that disclosure "pose[d] a concrete harm to law enforcement interests." In weighing the competing interests in determining whether the records were public, the Court also noted that "many other states are guided by statutory criteria that provide police and courts with a far better and more defined framework in making decisions about disclosure of this type of record." Two of the Justices concurred, agreeing with that the result, but stating that the reason why the records did not fall within the exemption was because "there was no crime." One dissenting justice found that the plain language of the exemption clearly evidenced a legislative intent "to withhold information on criminal investigations and investigative detentions not resulting in charges, while mandating disclosure of arrests accompanied by a formal criminal charge." The dissenting judge criticized the majority opinion for ignoring the plain language of the statute, and instead, "impos[ing] a variable, or floating, test for public access of police records, requiring a determination of "whether the temporary detention of a suspect amounts to an arrest for purposes of Fourth Amendment protection, even when, as here, no such claim of unconstitutional invasion is at issue. As a result of this "floating" test, the dissenting judge believed that custodians of police records "must now puzzle over 'de facto' arrest versus investigative detention not amounting to arrest—a moving target worthy of countless and diverse court decisions."

#State FOIA

Globe Newspaper Co. v. Superior Court for the Cnty. of Norfolk (In re Globe Newspaper Co., Inc.), 461 Mass. 113, 958 N.E.2d 822 (2011).

After a woman was indicted by a grand jury for the murder of her brother, a newspaper filed a motion to inspect and copy the inquest report and transcript of the inquest proceedings. The judge denied the newspaper's motion and ordered the inquest report and transcript to be impounded until further order of the court. The newspaper challenged the denial of its motion, claiming that the judge erred in concluding that the impoundment was governed by the common-law principles in *Kennedy v. Justice of the District Court of Dukes County*, 356 Mass. 367, 252 N.E.2d 201 (1969) (*Kennedy*), rather than the statute addressing inquest reports enacted after the *Kennedy* decision. The Massachusetts Supreme Judicial Court held that the report and transcript became presumptively public documents once the district attorney filed a notice, which indicated that the grand jury returned an indictment. The case was remanded with instructions to vacate the judge's denial of the motion.

#Court Proceedings

Gregerson v. Hennepin Cty., No. A14-0487, 2014 WL 4957978 (Minn. Ct. App. Oct. 6, 2014).

After a civil action was filed to recover damages a law enforcement agency secured search warrants in its investigation of alleged criminal activity by several of the defendants unrelated to the plaintiff's claims. Computers and imaged hard drives were seized. The plaintiff sought data from the agency for use in the civil action. The agency refused to comply with a subpoena served by the plaintiff and also refused to comply with a request for access to the data made by the plaintiff under the Government Data Practices Act. The plaintiff then sued to compel compliance with the Act. The trial court concluded that the data were not "government data" and granted summary judgment to the defendants. The Court of Appeals affirmed. It held that the data on the drives were "government data" because the data had been collected and maintained by a government entity. However, the plaintiff could neither receive copies of, nor search, the drives because federal law "classified" the data as private or confidential and hence exempt from disclosure under the Act. Citing *Riley v. California*, and noting that the warrants allowed the drives to be seized only for specific purposes, the Court of Appeals held that the owner or owners of the drives continued to have a reasonable expectation of privacy in the data that was not within the scope of the warrants. The Court of Appeals also rejected the argument that the Fourth Amendment would not apply to any "private" search the plaintiff would conduct.

#State FOIA

In re Indiana Newspapers Inc., 963 N.E.2d 534 (Ind. Ct. App. 2012).

The plaintiff, a former president of civic organization, brought a defamation action against an anonymous commenter to an online news article, and filed a motion to compel a newspaper to disclose the identity of the commenter. The superior court granted the plaintiff's motion and the newspaper appealed. The Court of Appeals held that the newspaper did not waive its privilege under the Shield Law, and as a matter of first impression, that the Shield Law did not allow newspaper to refuse to conceal commenter's identity. The court further held that the statement posted by the commenter was defamatory *per se*. Finally, *prima facie* evidence of actual malice was not required to compel discovery of the commenter's identity. Judgment was reversed and remanded with instructions.

#Pleadings & Orders

Judicial Watch, Inc. v. City of Phoenix, 228 Ariz. 393, 267 P.3d 1185 (Ct. App. 2011).

A police department provided a security detail for the mayor's protection and kept two types of records related to its activities: (1) annotations on the mayor's daily public calendar of his public activities ("annotated calendars"); and, (2) activity logs related to the mayor's daily unscheduled and personal activities ("worksheets"). The plaintiff organization made a public records request seeking all activity logs. The city provided the annotated calendars but refused to provide the worksheets, citing the mayor's safety, confidentiality, and that the worksheets were protected by the "deliberative process privilege." The plaintiff filed a special action to compel the city to disclose the worksheets. After an evidentiary hearing and *in camera* review of a "representative sample" of the worksheets, the court concluded that the worksheets were public records under state law. The court found that the mayor's privacy interest in the worksheets was insufficient to overcome the presumption favoring inspection but that security and confidentiality concerns outweighed the public's interest in disclosure. Moreover, it was not "necessary or feasible" to produce redacted versions of the worksheets because redacted versions would largely duplicate the annotated calendars. Both parties appealed. The issue on appeal was whether it was "necessary or feasible" to allow inspection of redacted worksheets. First, the court found that disclosure was necessary because the city failed to demonstrate how the redacted worksheets would merely duplicate the annotated calendars. Further, the court found that the city failed to specifically demonstrate how release of particular information would adversely affect the mayor's privacy interest. Second, disclosure was feasible because redacting the approximately

600 pages was not too burdensome a task. The case was remanded for a judgment ordering the city to redact the worksheets and make them available for inspection.

#State FOIA

Juneau County Star-Times v. Juneau County, 345 Wis. 2d 122, 824 N.W.2d 457 (2013).

This open records case examines whether a newspaper's request to the county for certain invoices—generated in the course of a law firm's representation of the county and an insurance company under the liability insurance policy between the county and the insurance company—were subject to disclosure under the Wisconsin Open Records Law. The provision required the government to disclose "any record produced or collected under a contract" entered into by the government. The Supreme Court of Wisconsin affirmed, holding that the invoices were "contractors' records" within meaning of the Law because the invoices were produced pursuant to the liability insurance policy, which constituted a contract between the county and the insurance company.

#State FOIA

In re Jury Questionnaires, 37 A.3d 879 (D.C. 2012).

This matter arose out of the highly publicized disappearance of a congressional intern and trial for her murder almost ten years later. In the middle of the government's case-in-chief, the court denied a newspaper's motion for leave to intervene to access written juror questionnaires. On appeal, the court held that the newspaper, as a surrogate for the public, had a presumptive First Amendment right to access written jury questionnaires used in a criminal proceeding as part of *voir dire* process, and that such a right did not expire once a trial ends. According to the court, there was no reason to distinguish written jury questionnaires from oral *voir dire* questions, since it was evident that the jury questionnaires in this case were used to facilitate the jury selection process by exposing any biases that otherwise would have been explored through oral questioning. Further, even though the jurors had been promised confidentiality regarding the questionnaires, the trial court erred in issuing a blanket denial of the newspaper's motion for leave to intervene. The court reversed and remanded to determine whether the First Amendment presumption had been overcome.

#Dockets & Judicial Records

KPNX-TV Channel 12 v. Stephens, 236 Ariz. 367, 340 P.3d 1075 (Ct. App. 2014).

A defendant had been convicted of first degree murder. The jury deadlocked on the penalty and a new jury empaneled for the retrial of the penalty phase. The defendant "wanted to

testify in mitigation outside the presence of the press and asked the court to seal the transcript of the testimony." The trial court closed the courtroom to everyone except the victim's family and sealed the defendant's testimony until after verdict. The Court of Appeals reversed. Exclusion of the public was an extraordinary measure that could occur only if there was a "clear and present danger that the judicial process will be subverted by an open hearing." Once the danger was found to exist the party seeking closure must demonstrate four "constitutional factors" before closure might be allowed. The defendant's argument was that a public presence would affect her ability to think and answer questions given threats against her. The court rejected that argument: "[w]hile we do not discount the volume or nature of *** [defendant's] mail or the fact that some people may wish her ill, here concern does not, as a matter of law, amount to an extremely serious substantive evil warranting closing the trial."

#Court Proceedings

KSTP-TV v. Ramsey County, 806 N.W.2d 785 (Minn. Ct. App. 2011).

Television stations sought access to the rejected absentee ballots from the election for United States Senate in the possession of the county. The district court granted summary judgment to the stations and the county appealed. The Court of Appeals reversed. The stations sought further review. The Supreme Court held that: (1) The statutory provision that classified certain government data as "private data with regard to data on individuals," and "nonpublic data with regard to data not on individuals," was not ambiguous simply because it classified sealed absentee ballots as containing information that was both private and nonpublic under the Minnesota Government Data Practices Act's (MGDPA) classification system; (2) the statutory language "sealed absentee ballots prior to opening by an election judge" was reasonably susceptible to only one meaning, and thus, unambiguous; and (3) sealed absentee ballots constituted non-public government data, and thus, television stations were precluded from accessing and copying the ballots. Judgment was affirmed.

#State FOIA

Lawson v. Office of the Att'y Gen., 415 S.W.3d 59 (Ky. 2013).

In this "reverse" action under the Open Records Act, an individual challenged the failure of lower courts to enjoin the Kentucky Attorney General from disclosing a statement the individual had provided in 1983 related to his involvement in a bid rigging scheme. Affirming the ruling the lower appellate ruling, the Kentucky Supreme Court held: (1) The individual had standing to invoke the privacy exemption under the Act; (2) the individual lacked standing to invoke an exemption intended to benefit prosecutors, and (3) disclosure would not be an "unwarranted" invasion of the individual's personal privacy. The individual's privacy interests had been "significantly diminished" as the statement had followed a federal guilty plea, the public had a legitimate

interest in learning why and how the individual's bidding privileges in Kentucky had been reinstated after the plea, and the "age" of the statement had not diminished the public interest.

#State FOIA

Maese v. Tooele County, 273 P.3d 388 (Utah Ct. App. 2012).

The plaintiff sought judicial review of a county commission chair's decision to uphold the denial of his Government Records Access Management Act (GRAMA) request. The plaintiff sought an electronic copy of the county's entire property transaction database as kept by the county, or in the alternative, a complete twenty-year historic property transaction report in electronic format. The county refused the request, stating that it required the county to improperly "...create a record or compile, format, manipulate, package, summarize, or tailor information; [or]...provide a record in a particular format, medium, or program not currently maintained by the government entity" in violation of GRAMA. Additionally, the county claimed the information was available for public review and copying during regular business hours. Summary judgment was granted to the county on the grounds that the language of GRAMA did not require the county to provide an electronic copy of the record if there is a paper equivalent. The appellate court upheld the decision, holding that GRAMA did not require them to fulfill the request, and that a paper copy, including scanned images, were available for review during business hours.

#State FOIA

In re Maine Today Media Inc., 59 A.3d 499, 2013 ME 12 (Me. 2013).

The trial court in this criminal case initiated jury selection through a process regularly used in Maine courts that provided for extensive individual *voir dire*, with the practical effect that the public was excluded from the *voir dire* process. After jury selection had begun, the trial court received a letter from counsel for a media company asserting a greater right to public access. The court initially agreed to open the process to the public upon the defendant's agreement. After considering his options and consultation with his attorney, however, the defendant expressed concerns about the ability to draw an impartial jury if the process used by the court was changed. The court then agreed to continue with the individual *voir dire* process. After jury selection had begun, the media company filed a motion to intervene. Given the lateness of the request and a concern that juror candor would be reduced, the trial court denied the motion. The media company filed an interlocutory appeal. The Maine Supreme Court held that, although the trial court exercises substantial discretion over the mode and conduct of *voir dire*, the trial court's generalized concern that juror candor might be reduced if *voir dire* was conducted in public was insufficient to bar the public or media from the entirety of the process. Accordingly, the matter was remanded for the trial court "to conduct the remaining voir dire in a presumptively public manner, exercising its considerable discretion to prevent the dissemination of sensitive juror information." The Supreme Court stated that public access to

the jury selection that already occurred could be addressed, at the court's discretion, by the release of appropriately redacted transcripts.

#Court Proceedings

McLeod v. Parnell, 286 P.3d 509 (Alaska 2012).

Under the state's Public Records Act, the plaintiff initially sought the release of then-governor's email from both her state-issued email account and her private email account. Summary judgment was granted in favor of the governor's office. On appeal by the plaintiff, the issue before the Alaska Supreme Court was whether a state employee using a private email address during the course of state business creates a public record, and whether this use constitutes a *per se* violation of the Act. The Alaska Supreme Court affirmed, holding that "public records" under the Public Records Act included those records which were "appropriate for preservation" under the state's Records Management Act. Although the use of private email accounts was not a *per se* violation of the law, the Court concluded that the use of private email accounts in matters "appropriate for preservation" constituted public records, which state officials was required to provide upon request.

#State FOIA

McNair v. Nat'l Collegiate Athletic Ass'n, 234 Cal. App. 4th 25, 183 Cal. Rptr. 3d 490 (2015).

This civil action arose out of an investigation conducted by the NCAA. The NCAA unsuccessfully moved to seal 400 pages of the record before the trial court. The trial court conditionally sealed the documents pending an appeal. On appeal, the NCAA moved to seal the same documents. The NCAA argued that its bylaws required it to keep the documents confidential and that confidentiality was necessary to enable it to conduct investigations from confidential sources. Applying the test established in *NBC Subsidiary (KNBC-TV) v. Superior Court,* the Court of Appeal held that the NCAA had failed to carry its burden to overcome the presumptive right of access to documents in civil proceedings. The by-laws made confidentiality "ephemeral," lasting only until a decision on the investigation was announced. No statutory privilege from disclosure was applicable and there was no substantial probability of prejudice.

#Discovery Materials

#Dockets & Judicial Records

Media Publishing Grp., LLC v. State, Case No.: 1D13-5721 (Fla. 1st Dist. Ct. App. Dec. 18, 2013).

Nonparty news organizations were granted leave to intervene and appeal from closure orders in an ongoing criminal proceeding. On appeal, the court held: "Petitioners' emergency petition for review of orders excluding the press from receiving public records is granted ***. This disposition is without prejudice to a subsequent motion to determine confidentiality of the records at issue or for a protective order limiting the disclosure of discovery materials. Should such a motion be filed, or if the trial court considers the matter on its own motion, the court is directed to immediately convene an evidentiary hearing, after providing appropriate notice to the Petitioners, for the purpose of determining whether closure (including, but not limited to, deferral of public access to pretrial discovery materials upon timely *in camera* review of such materials) in this cause is warranted by law ***. Following the hearing, the trial court shall promptly enter an order, stating with specificity its findings of fact and its reasons for granting or denying closure in this matter. Any party or intervenor adversely affected *** may file a timely petition for review ***." (footnote omitted).

#Court Proceedings

Montenegro v. City of Dover, 162 N.H. 641, 34 A.3d 717 (2011).

The plaintiff sought disclosure of information under the state's right-to-know law, pertaining to certain surveillance equipment and procedures under the control of defendant city. The court denied the request. On appeal, the Supreme Court of New Hampshire affirmed in part, holding that the materials were exempt under the "law enforcement purposes" exemption. The court added that the defendant was not required to establish that materials were investigatory in order for the exemption to apply. Further, the court found that the exemption did not conflict with the constitutional right to access to public records under state law. Conversely, on issue of apparent first impression, the court reversed and remanded regarding the disclosure of job titles, on the grounds that job titles did not constitute "internal personnel practice" within the meaning of the exemption.

#State FOIA

Nissen v. Pierce Cty., 183 Wash. 2d 863, P.3d 45 (2015).

"Five years ago we concluded that the Public Records Act *** applied to a record stored on a personal computer, recognizing that '[i]f government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined. *** Today we consider whether the PRA similarly applies when a public employee uses a private cell phone to conduct government business. We hold that text messages sent and received by a public employee in the employee's official capacity are public records of the

employer, even if the employee uses a private cell phone." The Washington Supreme Court rejected any distinction between the public or private nature of the device used to create the text messages. It did, however, distinguish public from "nonpublic" records in terms of search and set out a procedure for public employees and their employers to follow when a PRA request was made.

#State FOIA

N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70, 116 A.3d 570 (App. Div. 2015).

This was an interlocutory appeal from a trial court's order compelling disclosure of records pertaining to a criminal investigation under the Open Public Records Act and the common law right to inspect government records. The records were sought with regard to a fatal shooting of a criminal suspect after a high-speed chase. Interpreting both the Act and New Jersey common law, the Appellate Division remanded for reconsideration and directed the trial court to consider an *ex parte* showing by the State as to why the release of certain documents would "undermine its investigation and be inimical to the public interest."

#State FOIA

Paff v. Borough of Chatham, 2011 WL 5105477 (N.J. App. Div. 2011) (unpublished).

Following a police officer's demotion and suspension, the plaintiff blogger requested information regarding the length of the officer's suspension. Public officials refused to provide the information, citing the confidentiality accorded to personnel matters. The blogger sued the public officials under the state's Open Records Law and the common law right of access. After the trial judge reviewed the officer's disciplinary records *in camera*, it granted summary judgment in favor of the public officials. The appellate court affirmed, holding that the information was exempt as personnel records under state law. Under the common law right of access, the court held that the public interest in confidentiality outweighed the blogger's interest in the records. The court explained that disclosure would have a "chilling effect" on the police department's ability to hire personnel if applicants knew "that disciplinary sanction short of demotion" would be made public. Moreover, disclosure would implicitly and improperly reveal other confidential information about an officer, such as length of service, prior evaluations, prior infractions or commendations, and other mitigating circumstances.

#State FOIA

Palm Beach Newspapers, LLC v. State, No. 4D15-4572, 2016 WL 239048 (Fla. Dist. Ct. App. Jan. 21, 2016).

"Ordered that the petition for certiorari is granted on an expedited basis. The order prohibiting petitioner from publishing transcripts of the witness on its website and requiring that those which were previously published be removed is quashed. The order sealing the record is quashed as overbroad. An opinion addressing all issues will issue."

#Court Proceedings
#Dockets & Judicial Records
#Miscellaneous

People v. Harris (*In re Gee*), 2010 IL App (4th) 100275, 956 N.E.2d 460 (2010).

During the prosecution of a murder, newspapers petitioned to intervene and gain access to a sealed search warrant file. The district court granted the petitions to intervene but ordered the affidavit supporting the search warrant and the inventory to remain sealed. The newspapers appealed. The Court of Appeals affirmed, holding the presumption of public access in criminal proceedings did not attach to sealed-search warrant affidavit and inventory, either under the First Amendment, common law, or state law. The court noted that federal circuit courts were split over the issue, but emphasized that the warrant application process had not been historically open to the public. Further, even assuming that a qualified right of access applied, the court found that the generalized public interest was far outweighed by the substantial probability of compromising and interfering with an ongoing investigation. The court stated that a warrant application involved no public or adversary proceedings.

#Dockets & Judicial Records

People v. Holmes, Case No. 12CR1522 (D. Co. Apr. 4, 2013).

This is the prosecution arising out of the mass shootings in Aurora. Various media organizations moved to compel the release of probable cause affidavits in support of warrants and requests for the production of records. These had been sealed prior to the preliminary hearing, which had been conducted. The trial court determined that: (1) The organizations had standing to be heard; (2) the criminal justice records in issue were held by the court in its official capacity, (3) Colorado law required that a balancing test be conducted to determine whether "unrestricted access would pose a substantial probability of harm to the fairness of the trial, if suppression would effectively prevent such harm, and if there is no less restrictive alternative reasonably available to prevent the harm." Undertaking the balancing test, the court found that: (1) The organizations had a First Amendment right to the sealed records; (2) given that the identities of victims and

witnesses have been released, there was no valid privacy or safety concern that would outweigh unsealing; and (3) the defendant had failed to demonstrate any factor that would justify sealing.

#Dockets & Judicial Records

People v. Sledge, No. 324680, 2015 WL 5737805 (Mich. Ct. App. Oct. 1, 2015).

This was an appeal from a *sua sponte* trial court order that precluded "all potential trial participants" from making any extrajudicial statements to the media or to any individual for the purpose of "dissemination by public communications." That phrase included "all attorneys for the prosecution and the defense, the defendant and any agent acting on behalf of the attorneys ordered." The Court of Appeals held that the Detroit Free Press had standing to challenge the order "as a recipient of speech and as a news gatherer" and vacated the order as being vague and overbroad and an unconstitutional prior restraint.

#Court Proceedings
#Dockets & Judicial Records

Rapid City Journal v. Delaney, 2011 S.D. 55, 804 N.W.2d 388 (2011).

In a civil dispute over the management and control of a corporation, the trial judge was asked to determine the value of the corporation so that one faction of the family could buy the other out. At trial, both parties sought to protect "confidential business information" and moved to close the courtroom when financial information and testimony was presented on the corporation's value. The judge imposed a gag order on the parties and closed the trial and court records to the public. The media intervened and unsuccessfully petitioned for a *writ of mandamus* or prohibition, asserting that the gag order unlawfully interfered with media's First Amendment and common law rights. The Supreme Court granted the media's petition for review and held that, although the underlying trial was complete, the media's claims could be considered under an exception to the mootness doctrine. Additionally, it held that the First Amendment afforded the media and the public a qualified right of access. Finally, the court concluded that the trial court abused its discretion because: (1) It lacked the statutory or legal authority to issue a gag order; (2) failed to correctly apply the First Amendment or the common law presumption of openness; (3) failed to require the parties to show that closure was necessary to preserve higher value; (4) failed to articulate findings specific enough that a reviewing court could determine whether the closure order was properly entered; and (5) failed to narrowly tailor the closure order.

#Court Proceedings

Reno Newspapers, Inc. v. Gibbons, 266 P.3d 623 (Nev. 2011).

This case arose out of a newspaper's public records request for e-mails between the governor

and ten people over a six-month time period. In the event that the governor objected to the request, the newspaper asked that it alternatively be provided with a log indicating each e- mail's sender, recipients, message dates, and the basis on which access was being denied. The governor denied the request, claiming the e-mails were either privileged or not considered public records. The newspaper filed a petition for a *writ of mandamus* in the district court, seeking access to the e-mails or the alternative log. After a hearing and a review of the e-mails by the judge *in camera*, the district court granted the writ as to six e-mails, and denied the writ as to the remaining e-mails. The newspaper appealed. The Supreme Court held that, after the commencement of a lawsuit under the state's open records law, the requesting party generally is entitled to a log containing a factual description of each withheld record and a specific explanation for nondisclosure. Further, the Court found that the state had failed to satisfy pre- litigation requirements for claiming confidentiality of withheld e-mails since it did not cite to specific authority making the records confidential, and its informal employee e-mail policy did not have force of law. Thus, the court reversed and remanded with instructions.

#State FOIA

***Republican Party of New Mexico v. New Mexico Taxation & Revenue Dept.*, 2012 -NMSC- 026, 283 P.3d 853 (2012).**

A political party and director of voting organization brought action against various state departments and the custodian of public records after the state provided public records pursuant to the state's public records act, but redacted much of the information in the documents. The custodian of records claimed that, under the act, the redacted information was protected from disclosure by executive privilege. The district court granted summary judgment in favor of the state. The New Mexico Supreme Court granted *certiorari* before events transpired that effectively rendered the appeal moot. The Court exercised its authority to issue an opinion holding that the executive privilege exemption can only apply to communications between the governor (as chief executive) and those individuals close to the governor's office in an organizational and functional capacity. Thus, routine records such as those sought in this case—although managed by the executive branch or government—were not permissibly withheld through executive privilege.

#State FOIA

***Rueger v. Natural Res. Bd.*, 191 Vt. 429, 49 A.3d 112 (Vt. 2012).**

The plaintiffs sought records pursuant to an Access to Public Records Act (PRA) request. The respondents withheld some of the requested documents claiming a lawful exemption under the statute because they reflected the deliberations of a state agency, acting in a quasi-judicial role. Plaintiffs sued to compel disclosure and the trial court ruled in favor of the state. Upon appeal, the Vermont Supreme Court affirmed the prior decision find that the documents requested fell

within the plain language of the statute that exempts records of or materials prepared for deliberations or quasi-judicial procedures. Additionally, the Court noted that protecting deliberations of this nature was for the public good in that judicial and quasi-judicial officers would be reluctant to engage in frank dialogue, or otherwise may be persuaded by public opinion, if they knew that their deliberations would be public record.

#State FOIA

***Rutland Herald v. Vermont State Police*, 191 Vt. 357, 49 A.3d 91 (2012).**

The plaintiffs made a public records request to the state police relating to a criminal investigation into the possession of child pornography by employees at a state police academy. The state refused, citing statutory provisions permitting the withholding of records dealing with the detection and investigation of crime. The plaintiffs filed suit and the trial court granted summary judgment in favor of the state. The appellate court affirmed and held that the legislative intent of the state public records act was that criminal investigative records be permanently exempt, citing the omission of temporal language in this area that pervades other areas of the PRA.

#State FOIA

***Sander v. State Bar,* 58 Cal.4th 300, 314 P.3d 488, 165 Cal.Rptr.3d 250 (2013).**

The plaintiffs sought to compel the State Bar of California to disclose certain information in its bar admission database to "conduct research on racial and ethnic disparities in bar passage rates and law school grades." The trial court denied access. The Court of Appeal reversed, holding that the common law right of access to judicial records created a presumption in favor of disclosure. The California Supreme Court found that: (1) "the statutes and rules specifically applicable to the State Bar neither demand nor prohibit access to the State Bar's admissions database that plaintiffs seek, although they do confirm that members and applicants have some expectation of privacy in their records;" (2) the common law right of access to public records extended beyond those that "officially memorialize or record government action" to documents in which there is a "legitimate public interest;" and (3) "the public's interest in the information in the database would contribute to the public's understanding of the State Bar's admission activities, and is sufficient to warrant further consideration of whether any countervailing consideration weighs against public access." The court then noted that, "[b]ecause plaintiffs do not seek the information in a manner that would reveal the identities of individual applicants, the State Bar's promises of confidentiality do not necessarily preclude public access to the database. It also recognized that questions of fact remained about a form of production that would, "satisfy the public's right of access while preserving applicants' privacy."

#Dockets & Judicial Records

Schroeder v. Utah Attorney Gen.'s Office, 2015 UT 77, 358 P.3d 1075 (Sup. Ct. 2015).

This action was commenced after the denial of the plaintiff's request under the Government Records Access and Management Act for access to bank records seized lawfully by the Attorney General's Office in a criminal investigation. At issue were (1) bank records of a nonprofit organization, (2) a summary of the bank records prepared by an investigator and (3) "a post-it note upon which the investigator claimed to have written directions from state prosecutors." A trial court denied any access. The Utah Supreme Court held that there can be no "violation of section 14 [of Article 1 of the Utah Constitution] when the government obtains information through a valid warrant or subpoena, so the state constitution does not exempt the bank records from GRAMA's public disclosure requirements." The Supreme Court also held that the trial court had correctly classified the summary and note as attorney work product but reversed because "the State terminated its investigation years ago, so the interests favoring protection are not as compelling as those favoring disclosure."

#State FOIA

Shane v. Parish of Jefferson, 2014-C-2225 (La. Sup. Ct. Dec. 8. 2015).

"This case presents the issue of whether email communications of an employee of a public agency, via the public agency's email system, on private political matters with private individuals, are subject to disclosure under Louisiana's Public Records Law ***, when those emails have been referenced in audits of the public agency. Upon a balancing of the public and private interests ***, we conclude that constitutional rights of privacy and association asserted by the plaintiff/private email correspondent are adequately protected by the release of the emails with redaction of all references to the private individuals ***."

#State FOIA

Sierra Club v. Superior Court, 57 Cal.4th 157, 158 Cal.Rptr.3d 639, 302 P.3d 1026 (2013).

"The issue in this case is whether the OC [Orange County] Landbase [by which a user can create a layered digital map containing information for over 640,000 parcels of land that includes various information] is subject to disclosure in a GIS file format at the actual cost of duplication under the California Public Records Act or whether *** it is covered by the statute's exclusion of '[c]omputer software' *** from the definition of a public record. We hold that although GIS mapping software falls within the statutory exclusion, a GIS-formatted database like the OC

Landbase does not. Accordingly, such databases are public records that, unless otherwise exempt, must be produced upon request at the actual cost of duplication."

#State FOIA

Smith v. Township of Richmond, 82 A.3d 407 (Pa. 2013).

"This Sunshine Act dispute concerns whether meetings between an agency and outside entities, including those involved in ongoing litigation with the agency, entailed 'deliberations'—and thus, should have been opened to the public— where the subject of the meetings was the same as that of the litigation, although the agency claims the meetings were for information-gathering purposes only." The Pennsylvania Supreme Court held: "Gatherings held solely for the purpose of collecting information or educating agency members about an issue do not fit in this description [of a "meeting" that must be open to the public under the Act], notwithstanding that the information may later assist the members in taking official action on the issue." The court did note that two public officials had expressed differing views about a settlement of litigation during one "gathering," but the exchange appeared to have been *de minimus,* and that, in any event, "the Sunshine Act does not authorize courts to invalidate official action taken at a subsequent public meeting that conforms to the Act's requirements, based on an earlier, improper closed-door meeting."

#State FOIA

Sorenson v. Superior Court, 219 Cal.App.4th 409, 161 Cal.Rptr.3d 794 (2013).

Two jury trials had been conducted to determine whether an individual should be involuntarily committed. He was not. Thereafter, he was charged with the murder of his mother. The prosecutor and a local newspaper sought access to the trial transcripts. The requests were granted. The Court of Appeal reversed, concluding, "involuntary conservatorship proceedings *** are not 'ordinary civil trials and proceedings' *** that are presumptively public. Rather, they are special proceedings. But they are not special proceedings for which there is a qualified First Amendment right of public access. There is not such a tradition of openness and utility associated with having the proceedings public to support a finding of a constitutional right of access."

#Court Proceedings

State ex rel. Missouri Lawyers Media, LLC v. Disciplinary Hearing Panel No. DHP-11-029, 396 S.W. 3d 931 (Mo. 2013) (*per curiam*).

In this original matter, the Missouri Supreme Court construed recently-adopted Rule 5.31, which governs "Records of Investigations and Formal Proceedings." The rule "sets out standards for determining when [attorney] disciplinary hearings and records shall be confidential and when they shall be made public." The rule provides that a protective order may issue if good cause is shown to "protect the interests of a complainant, witness, third party, or respondent" and that

any order must be narrowly drawn. Here, the chair of a hearing panel issued a blanket protective order. A legal media organization challenged the order through an application for a writ of *mandamus.* The Missouri Supreme Court granted the writ in part, concluding that the panel erred "in making all aspects of the proceeding confidential subject to later review to determine whether portions should be made public." The court directed the panel to comply with Rule 5.31, which set forth requirements for confidentiality.

#Court Proceedings

State ex rel. Schiffbauer v. Banaszak, **2015-Ohio-1854, 142 Ohio St. 3d 535, 33 N.E.3d 52 (Sup. Ct. 2015).**

A news editor at a private college sought production of criminal reports of students and nonstudents whose cases had been referred to a municipal court by the college police department. The college declined the request, contending that it was not subject to the Public Records Act. The relator then commenced an original *mandamus* action in the Ohio Supreme Court, which characterized the question before it as whether the department was a "public office" as defined by the Act. Looking at the statutory scheme under which the department was established, the Supreme Court concluded that the department exercised a governmental function under Ohio law and was therefore within the statutory definition and subject to the Act's production requirements.

#State FOIA

State in Interest of Doe**, No. A-2229-14T1, 2015 WL 680907 (N.J. Super. Ct. App. Div. Feb. 17, 2015) (*per curiam*).**

Proceedings had been commenced against seven juveniles accused of sexual offenses. A trial judge granted an *ex parte* motion to enjoin media organizations from publishing the identities of the juveniles and the alleged victims. After an interlocutory appeal and remand the trial judge granted the same relief. On a second interlocutory appeal the Appellate Division reviewed the controlling New Jersey statute and court rule and affirmed the trial court's denial of access to the juvenile records and proceedings:

The statute and rule *** authorize the denial of access when there exists a potential of harm to the juveniles charged. And, although both authorities are silent on the matter, we could conclude that a court should also be sensitive to the potential harm to a juvenile victim caused by opening the proceedings to the media or the public in general.

The media organizations also challenged on First Amendment grounds the order that enjoined them from identifying the juveniles. The Appellate Division as to information "obtained through access to the court's confidential records or proceedings" but vacated the injunction as to

information obtained "through lawful means." The Appellate Division further assumed that the injunction would be binding throughout the delinquency proceedings but directed that the trial judge provide the parties an opportunity to be heard "about its further duration once the juvenile proceedings end."

#Court Proceedings
#Dockets & Judicial Records

In re Subpoena Duces Tecum on Custodian of Records, 214 N.J. 147, 68 A.3d 308 (2013) (*per curiam*).

This matter came before the New Jersey Supreme Court to consider the confidentiality of a form used to determine whether a criminal defendant was indigent and entitled to appointed counsel. The form includes financial data which a defendant must certify to be accurate. The State alleged that the defendant's data was inaccurate and false and issued a trial subpoena to determine whether a second prosecution would be warranted. The Supreme Court affirmed the quashing of the subpoena given assurances of confidentiality that appeared on the form. Exercising its supervisory power, the court directed that the form be modified to permit the disclosure of financial information pursuant to a grand jury subpoena. The court set forth other conditions that must be satisfied to obtain financial information: (1) Prosecutors must ask that the defendant make certain affirmations "at an early court appearance attended by court-appointed counsel"; (2) prosecutors may not use financial disclosures on the form to "prove the pending case"; and (3) prosecutors must present grand jury subpoenas with a detailed affidavit.

#Dockets & Judicial Records

Union Leader Corp. v. New Hampshire Ret. Sys., 162 N.H. 673, 34 A.3d 725 (2011).

A newspaper publisher requested from the state a list containing the names of 500 state retirement system members who received the highest annual pension payments during a specific year, as well as the specific amounts received by each member. After the state refused to provide the information, the plaintiff filed an action under the state's public access law. The trial court ordered the state to disclose the records, finding the information "subject to mandatory disclosure" under state law and not exempt as a record "whose disclosure would constitute invasion of privacy." The State appealed. The appellate court held that, based on the plain language of the public access law, the records were not subject to mandatory disclosure. The court then applied a three-part test to determine whether release of the public records would entail an invasion of privacy. First, the court found that retirees had privacy interests in their names and benefit amounts, similar to public employees' privacy interests in their names and salaries. Second, the court found that the public had an interest in knowing how public funds

were spent, and in uncovering corruption and error. Finally, the court found that the privacy interests at stake were outweighed by the public interest in knowing where and how tax dollars were spent. Accordingly, the court concluded that disclosure would not constitute an invasion of privacy under the state law.

#State FOIA

Vares-Ebert v. Kelberg, 2012 WL 33902 (N.J. App. Div. Jan. 9, 2012) (unpublished).

The plaintiff filed a complaint against doctors in a wrongful death action, and the matter was settled prior to trial. On appeal, the plaintiff challenged the trial court's order that enforced the settlement agreement. The plaintiff claimed, among other things, that the confidentiality provisions in the agreement were unconstitutional. The appellate court agreed, holding that the confidentiality provisions were inconsistent with the state's public access laws and should thus be severed from the agreement. The lower court order was affirmed as modified.

#Settlement

Ward & Lee, P.L.C. v. City of Claremore, 316 P.3d 225 (Okla. Civ. App. 2013).

The plaintiff law firm requested, pursuant to the Oklahoma Open Records Act, that the defendant police department produce video and audio recordings as well as written reports related to the drunken driving arrest of an individual. The defendant complied in part but refused to produce a "dash camera" video, arguing that it was not a "record" as defined by the Act, although the video was produced in discovery in the individual's prosecution. The trial court denied injunctive and declaratory relief to the firm in an action brought under the Act. The appellate court reversed, holding that the trial court erred in finding that there had been "technical compliance" with the Act because the firm's disclosure request had listed an incorrect date, and "[t]he dash cam video *** is a recording created by and under the authority of public officials in connection with the transaction of public business. Thus, the arrest video is a 'record' as defined by the Act." The appellate court also held that the video constituted a "fact[] concerning the arrest" under the Act and that the Act did not have an exemption for something that might constitute evidence in a prosecution. The appellate court remanded for further proceedings and awarded reasonable attorneys' fees to the plaintiff.

#State FOIA

West v. Everett, No. 15-2-03894-8 (Wash. Super. Ct. Dec. 7, 2015).

In or about 2009, the City of Everett police investigated baristas who worked at coffee stands. The investigation resulted in images of partially or completely unclothed baristas. A request

was made under the Public Records Act for the images, which the baristas opposed. A court declined to enjoin production, "the images were turned over, and were soon available to all on the internet where, the parties seem to agree, they are available to this date." In 2013, the police began another investigation of baristas and others and seized video surveillance records of behavior at the stands captured by various sources, including the FBI. The video captured public exposure and prostitution. The plaintiff filed this civil action after the city denied his PRA request for the video unredacted and in electronic form.

The primary issue for the Court's determination is whether or not a constitutional privacy right prohibits the City from making public records which are legitimate concern to the public, available for copying sas well as inspection, because they contain images of nude people and sex acts not exhibited privately, which then could be posted on the internet. This Court concludes that it does not.

The court also rejected the city's argument that disclosure of video provided by the FBI would hinder future cooperation with that agency.

#State FOIA

Williams v. MLB Network, Inc., **No. A-1674-14T3, 2015 WL 5313667 (N.J. Super. Ct. App. Div. Sept. 10, 2015).**

The defendant took an interlocutory appeal from the denial of its motion to seal an employment agreement between itself and the plaintiff, a well-known sports commentator. The defendant argued on appeal that the agreement was confidential and that it would "suffer a competitive disadvantage if plaintiff's salary and other terms of the agreement were made public." The Appellate Division affirmed. The governing court rule imposed stringent standards on sealing and the defendant's "sweeping, generalized contentions" failed to prove the likelihood of a "clearly defined and serious injury."

#Dockets & Judicial Records

Statutes, Regulations, Etc.—Federal

Privacy Protection for Filings Made with the Court, FED. R. CIV. P. 5.2

(requiring redaction of certain personal information in filings, limiting electronic access to certain electronic filings, etc.).

#Dockets & Judicial Records

Public Access to Documents and Proceedings, D. COLO. L. CIV. R. 7.2

(declaring presumptive public right of access to all filed documents and court proceedings and establishing procedure for motions to restrict access).

#Dockets & Judicial Records
#Court Proceedings

Public Access to Documents and Proceedings, D. COLO. L. CRIM. R. 47.1

(same as above applied to *criminal* filings and proceedings).

#Dockets & Judicial Records
#Court Proceedings

Filings Under Seal; Disposal of Sealed Materials, S.D. FLA. GENERAL RULE 5.4

(declaring presumptive right of access to civil and criminal filings and proceedings and establishing procedures for motions to restrict access).

#Dockets & Judicial Records
#Court Proceedings

PROCEDURE 8: CONFIDENTIALITY VOLUNTARY E-MEDIATION PROGRAM OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS (OCT. 1, 2013)

("Except as otherwise provided by law, communications between the mediator and parties are confidential and should not be disclosed other than to participants in the mediation, and will not be a part of the public record *** .").

#Settlement

Policy with Regard to Open Judicial Proceedings, 28 C.F.R. § 50.9

(Department of Justice guidelines for all "attorneys of the United States" with regard to moving or consenting to closing of civil or criminal judicial proceedings).

#Court Proceedings

Guidelines on Citing to, Capturing, and Maintaining Internet Resources in Judicial Opinions/Using Hyperlinks in Judicial Opinions **(JUD. CONF. OF UNITED STATES: MAY 22, 2009)**

(suggesting procedures regarding use and preservation of cited Internet information to ensure reliability of citations in opinions).

#Miscellaneous

Statutes, Regulations, Etc.—State

"Colorado Supreme Court, Court of Appeals, Office of the State Court Administration launch Twitter accounts @CoSupreme Court, @CoCourtAppeals and CoCourts now on Twitter" (Colorado Jud. Branch: posted Nov. 17, 2015), available at https://www.courts.state.co.us/

#Court Proceedings
#Dockets & Judicial Records

Delivering Our Message: Court Communication Plan for the Judicial Branch of Florida January 2016
(Judicial Mgmt. Council, Florida Supreme Court: released Dec. 28, 2015), available at http://www.flcourts.org/core/fileparse.php/248/urlt/2016-Judicial-Branch-Court-Communication-Plan.pdf

#Court Proceedings
#Dockets & Judicial Records

Guidelines for Use of Laptops by the Media **(Del. Ch. SEPT. 18, 2012)**
(establishing guidelines to be "strictly adhered to" for "use of laptops by members of the media attending Court of Chancery proceedings").

#Court Proceedings

LPD Bulletin 14-0193, "Video/Audio Recording Information,"
(Lakeland (Fla.) Police Dept. Crime Analysis & Intelligence Ctr. (undated)), available at https://assets.documentcloud.org/documents/2642201/291972706-LPDBulletin14-0193.pdf
#Miscellaneous
#State FOIA

Press Release, New York State Unified Court System, "Chief Judge Announces Amended Rules Addressing Audio-Visual Coverage of Court Proceedings"
(Dec. 22, 2015), available at http://www.nycourts.gov/PRESS/PDFs/PR15_22.pdf

#Court Proceedings
#Dockets & Judicial Records

Public Access to Documents Filed with the Court in Civil Actions, Del. Ch. R. 5.1

(declaring presumptive public right of access to all filed documents and court proceedings and establishing procedure for "confidential treatment" of documents; *see* explanatory document, PROTECTING PUBLIC ACCESS TO THE COURTS: CHANCERY RULE 5.1).

#Dockets & Judicial Records
#Court Proceedings

Public Access to Judicial Branch Records, FLA. R. JUD. ADMIN. 2.420 (2014)

(establishing procedures for determining confidentiality of judicial records and filing of documents containing confidential information in civil and criminal proceedings).

#Dockets & Judicial Records
#Court Proceedings

Opinion 239, GEORGIA JUDICIAL QUALIFICATIONS COMM'N (Aug. 28, 2013)

(clarifying "how the open courtroom issue relates to our role as this state's regulatory body for the judiciary and in specific response to requests by judges for guidance as to how best to ensure compliance with the law regarding public access to judicial proceedings" and recognizing that, "judges who do not adhere to the open courtroom principles" may be in violation of the Georgia Code of Judicial Conduct).

#Court Proceedings

Access to Court and ADLRO (Administrative Driver's License Revocation Office) RECORDS, HAWAI'I CT. RECS. R. 10.1 (2010)

(declaring presumptive right of accessibility to court and ADLRO records, describing manner in which electronic records may be provided, prescribing procedure for documents or evidence submitted for *in camera* review, addressing requests for "bulk, discrete or compiled information," etc.).

#Dockets & Judicial Records

***Rules for Expanded Media Coverage*, *IOWA COURT RULES*, CH. 25 (2010)**
(establishing procedures for "[b]roadcasting, televising, recording, and photographing *** in the courtroom and adjacent area during sessions of the court, including recesses between sessions").
#Court Proceedings

***Metadata Retention Guidance*, RECORDS MANAGEMENT SERVICES, MI. DEPT. OF TECH., MGMT., & BUDGET (2013)**
(defining four categories of metadata in context of recommending that State agencies establish procedures for disposal of metadata).

#Dockets & Judicial Records

***Oklahoma Open Records Act: Definitions*, 51 O.S. 24A.3(1)(h)(3)(2005)**
("'Record' does not mean audio or video recordings of the Department of Public Safety").

#State FOIA

***Destruction, Sealing, and Redaction of Court Records*, WA.ST. CT. GEN. R. GR15 (2006)**
(establishing "uniform procedure for the destruction, sealing, and redaction of court records" for "all court records, regardless of the physical form ***, the method of recording ***, or the method of storage ***").

#Dockets & Judicial Records

Section 23-1-240, South Carolina Code of Laws,
(Body-worn cameras; definition; guidelines; policies and procedures; fund; data release), effective date June 10, 2015, available at **http://www.scstatehouse.gov/code/t23c001.php**

#Miscellaneous
#State FOIA

Articles

S.C. Bennett, "Is America Ready for the Right to be Forgotten?" *NYSBA Journal* 11 (Jan. 2016)

#Miscellaneous

R. Bradway, *Metadata as a Public Record: What It Means, What It Does*, DIGITAL MEDIA LAW PROJECT (JULY 25, 2013)
(analyzing *O'Neill v. City of Shoreline* (*q.v.*) and suggesting that States "clearly define what constitutes metadata and implement procedures to regulate its collection and preservation" under open records laws).

#Dockets & Judicial Records

D.S. Clancy, C.A. Lisy & B.J. Brodeur, "Mending the Wall: A Call for a Presumption of Confidentiality in the Federal Civil Rules," *Litigation* 34 (ABA: Fall 2014)

#Discovery Materials
#Dockets & Judicial Records

Conference of State Court Administrators, *2012-2013 Policy Paper: To Protect and Preserve: Standards for Maintaining and Managing 21st Century Court Records*

#Dockets & Judicial Records

S. Gidiere & T. Simpson, *Federal Information Access Gets an Upgrade*, TRENDS (ABA Sec. on Environment, Energy, and Resources) Mar./Apr. 2013
(reporting on Web-based tool for "submitting, tracking, and reviewing" FOIA requests).

#Freedom of Information Act

R.J. Hedges, "Hiding the Costs of eDiscovery from the Public: What's the Rhyme or Reason?" 15 *DDEE* 374 (2015)

#Discovery Materials
#Dockets & Judicial Records

G. Hurley, *Body-Worn Cameras and the Courts* (NCSC: 2016), available at http://www.sji.gov/body-worn-cameras-and-the-courts/

#Miscellaneous
#State FOIA

K.B. Kaplan, *Will Virtual Courts Create Courthouse Relics?*, 52 THE JUDGES' JOURNAL 2 (ABA Judicial Div., Spring 2013)
(questioning whether, among other things, lack of physical accessibility to courts may result in "loss of trust and confidence in the courts because the public will no longer be in the presence" of judges, etc.).

#Court Proceedings

M. Kosciejew, "Digital Vellum and Other Cures for Bit Rot," *Information Management* 20 (ARMA: May/June 2015)

#Dockets & Judicial Records

A. Liptak, *Prosecutors Can't Keep a Secret in Case on Steroid Use*, N.Y. TIMES, JUNE 23, 2006)
(reporting on prosecutorial error in redacting sensitive information which allowed redactions to be viewed in different electronic form).

#Miscellaneous

Media Freedom & Information Access Clinic, *Police Body Cam Footage: Just another Public Record* (Dec. 2015)

#Miscellaneous
#State FOIA

N.S. Marder, *Judicial Transparency in the Twenty-First Century* (Pound Civil Justice Institute: 2015)

#Dockets & Judicial Records

N. Raaen, "Order in the Courts! RM Principles for the Judiciary," *Information Management* 28 (ARMA: Jan/Feb. 2014)

#Dockets & Judicial Records

R.T. Reagan, *Confidential Discovery: A Pocket Guide on Protective Orders* (FJC: 2012)

#Discovery Materials
#Dockets & Judicial Records

***Restored Historic Court Records are Returned to Virgin Islands*, THIRD BRANCH NEWS (UNITED STATES COURTS: NOV. 26, 2013)**
(reporting on restoration and rebinding of judicial records from 1767 to 1880).

#Dockets & Judicial Records

S.M. SMITH, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 FED. CTS. L. REV. 177 (2009)
(addressing judicial power to seal court proceedings and concluding that, "a court's inherent power to supervise its own records does not include the power to undermine the source of its own legitimacy").

#Court Proceedings

H.S. TEMPLE, *Are Digitalization and Budget Cuts Compromising History?* ABA J. (May 1, 2013)
(reporting that "law libraries are trying to adapt to the digital revolution and preserve historic and precedential documents" but that budget cuts are "creating concerns that the public will lose access to essential legal documents").

#Miscellaneous

J. VALENTINO-DEVRIES & D. YADRON, *Open Secret About Google's Surveillance Case No Longer Secret*, WALL ST. J. (AUG. 26, 2013)
(reporting on error in releasing name of entity in electronically-filed brief *after* Justice Department had secured redaction order).

#Miscellaneous
United States Courts, "Court Libraries Adapt to Deep Cuts, Changing Technology" (posted Dec. 21, 2015)

#Miscellaneous

E. Volokh, "An Injunction against Speech Harms Not Just the Speakers but Also the Listeners," *Washington Post* (posted Dec. 21, 2015)

#Court Proceedings
#Dockets & Judicial Records

Sample Protective Orders

***In re Applications of Deutsche Telekom AG, T-Mobile USA, Inc., and MetroPCS Communications, Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, 27 F.C.C.R. 13098 (OCT. 17, 2012)**
(adopting procedures to "provide more limited access to certain particularly competitively sensitive information that may be filed").

#Pleadings & Orders
#Discovery Materials

The Sedona Conference® *International Principles on Discovery, Disclosure, & Data Protection: Best Practices, Recommendations & Principles for Addressing the Preservation & Discovery of Protected Data in U.S. Litigation, Appendix B: Stipulated Protective Order Re: Protected Data* (Dec. 2011)
(This form of order is intended to "facilitate the production and receipt of information during discovery" in litigation in a United States district court and includes provisions addressing the production of information protected by, among other things, foreign privacy laws). (*Available at* https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20International%20Principles%20on%20Discovery%2C%20Disclosure%20%2526%20Data%20Protection.)

#Pleadings & Orders
#Discovery Materials

WHAT IS LITIGATION SUPPORT
THE LANGUAGE OF LITIGATION SUPPORT
I HAVE ELECTRONIC DATA...NOW WHAT?
WHO IS THE NATIONAL LITIGATION SUPPORT TEAM
COORDINATING DISCOVERY ATTORNEYS
CJA PANEL ATTORNEY SOFTWARE DISCOUNTS
ESI PROTOCOL: JETWG RECOMMENDATIONS FOR ESI
RESOURCE MATERIALS
LITIGATION SUPPORT BLOG

The Department of Justice/Administrative Office Joint Working Group on Electronic Technology (JETWG) has developed a recommended ESI protocol for use in federal criminal cases. Entitled "**Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases**", it is the product of a collaborative effort between the two institutions and it has the DOJ leadership's full support.

The primary purpose of the ESI protocol is to facilitate more predictable, cost-effective, and efficient management of electronic discovery and a reduction in the number of disputes relating to ESI. The protocol provides a mechanism, through a meet and confer process, to address problems a receiving party might have with an ESI production early in a case, and to discuss the form of the discovery that the party receives. The participants on both sides of JETWG are intimately familiar with the day-to-day challenges attorneys face in criminal cases, and the protocol reflects a pragmatic approach to the problems both prosecutors and defense attorneys face when dealing with electronic discovery.

JETWG negotiated and drafted the protocols over an 18-month period. The joint working group has representatives from the Federal Defender Offices, CJA Panel, Office of Defender Services, and DOJ, with liaisons from the United States Judiciary. Andrew Goldsmith, the DOJ National Criminal Discovery Coordinator, and Sean Broderick, the National Litgation Support Administrator, serve as co-chairs. Donna Elm, Federal Public Defender for the Middle District of Florida, Doug Mitchell, CJA Panel Attorney District Representative for the District of Nevada, Bob Burke, Chief of the Training Branch for Office of Defender Services, and Judy Mroczka, Chief of the Legal and Policy Branch for Office of Defender Services, round out the membership on the Defender Services side of the joint working group.

The ESI protocol was directly impacted by input from FDO and CJA panel attorneys, FDO technology staff, paralegals, and investigators in the field. In addition, we received comments and input on draft versions of the Recommendations from different working groups compromised of Federal Defenders and CJA panel representatives (just as DOJ did on their side).

The Recommendations consist of four parts:

1. an Introduction containing underlying principles, with hyperlinks to related recommendations and strategies;
2. the Recommendations themselves;
3. Strategies and Commentary that address technical and logistical issues in more detail and provide specific advice on discovery exchange challenges; and
4. an ESI Discovery Production Checklist.

In general, the agreement is designed to encourage early discussion of electronic discovery issues through "meet and confers," the exchange of data in industry standard or reasonably useable formats, notice to the court of potential discovery issues, and resolution of disputes without court involvement where possible.

This is an important step towards addressing the ESI challenges that people can face in a federal criminal case. Although almost all information is now created and stored electronically, the discovery provisions of the Federal Rules of Criminal Procedure are largely silent on this issue. At the same time, there is a void to fill resulting from our shift from a paper to a digital-based society. The National Litigation Support Team expects to continue the collaborative process with DOJ, and looks forward to an ongoing dialogue with people in the field who are dealing with electronic discovery.

http://www.mass.gov/ago/bureaus/criminal/the-cyber-crime-division/electronic-information.html

OUR SPEAKERS

Ronald J. Hedges, LLP
Hackensack, New Jersey
Judge Ronald J. Hedges is the principal in Ronald J. Hedges, LLC. He has extensive experience in e-discovery and in management of complex civil litigation matters.

Mr. Hedges was appointed in 1986 as a United States Magistrate Judge in the United States District Court for the District of New Jersey, where he served as the Compliance Judge for the Court Mediation Program, a member of the Lawyers Advisory Committee, and both a member and reporter for the Civil Justice Reform Act Advisory Committee. From 2001 to 2005 he was a member of the Advisory Group of Magistrate Judges. Mr. Hedges has also been an adjunct professor at Seton Hall University School of Law (1993-2007) and at Georgetown University Law Center since 2006. He is also Co-Chair on the Planning Committee of Georgetown University Law Center's Advanced E-Discovery Institute since November 2007. Recently, he was of counsel to Nixon Peabody, LLP.

Publications Include:
Managing Discovery of Electronic Information; A Pocket Guide for Judges (co-author), Federal Judicial Center: 2007.) *Discovery of Electronically Stored Information: Surveying the Legal Landscape (2007) "Juries and Punitive Damage Awards,"* BNA Metropolitan Corporate Counsel 48, Nov. 2006. *"The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases"* (rev. Apr. 2005 public comment draft), coeditor *"A View from the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure,"* 227 F.R.D. 123, 2005. *"Proposed Rule 37(f); Safe Harbor or Unchartered Minefield?"* Digital Discovery & e-Evidence, Vol. 5, No. 7, July 2005. *"Introduction to the Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality, and Public Access in Civil Cases,"* Business Torts Journal, Vol. 13, No. 1, Fall 2005. *"A Critical Appraisal of Proposed Amendment to Federal Rule of Civil Procedure 26(b)(5)(B),"* Digital Discovery & e-Evidence, Vol. 5, No. 2, March 2005. *"Striving for Judicial Balance During the War on Terrorism,"* New Jersey Reporter, Vol. 32, Issue 1, 52, December 2002–January 2003. *"Outlines on Arbitration, Digital Discovery, Management of Complex Civil Cases, Mediation and Punitive Damages,"* published in ALI-ABA course materials. *"Introduction to the Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality, and Public Access in Civil Cases,"* Business Torts Journal 14, Fall 2005.

Memberships:
Mr. Hedges is a member of the American Law Institute, the American Bar Association, and the Federal Bar Association. He is a member of the Board of Directors of the Historical Society and the Lawyers Advisory Committee of the United States District Court for the District of New Jersey. Mr. Hedges was a judicial advisor to the Association of the Federal Bar of the United States District Court for the District of New Jersey.

Mr. Hedges is a member of the Sedona Conference Advisory Board; the Sedona Conference Working Group on Protective Orders, Confidentiality, and Public Access; and the Sedona Conference Working Group on Best Practices for Electronic Document Retention & Production. He is also a member of the Law Alumni Board and the E-Discovery Advisory Board of

Georgetown University Law Center, and a member of the CPR E-Discovery Committee. He is also currently a Member of the ARMA Records Destruction Task Force.

The Honorable Edward A. Jerejian, J.S.C. was sworn in as a Judge of the Superior Court in 2006 and is currently assigned to the Bergen County Criminal and General Equity Divisions.

Prior to being elevated to the bench Judge Jerejian was a Certified Criminal Trial Attorney and handled many high profile case, including more than twenty homicide trials to a verdict.

He lectures extensively on topics related to criminal law and social media and is currently a member of the Supreme Court Criminal Practice committee.

In 2016, Judge Jerejian was designated by the Supreme Court of New Jersey as a state wide "special master" to handle a universe of thousands of drug cases arising out of the scandal at the State Police Laboratory in Totowa, New Jersey.

Angelo J. Onofri was appointed acting Mercer County prosecutor, effective March 1, 2015, by Acting Attorney General John Jay Hoffman. As the county's chief law enforcement officer, he leads the 200-member prosecutor's office.

Mr. Onofri was instrumental in the formation of the Mercer County Homicide Task Force and the Mercer County Shooting Response Team. He also played a vital role in the implementation of the Narcan program in Mercer County and the expansion of the Mercer County Narcotics Task Force. Additionally, Mr. Onofri coordinated Mercer County law enforcement efforts for the national Special Olympics USA games held in Mercer County in 2014.

Mr. Onofri is a member of the Attorney General's Body Worn Camera and Officer-Involved Shooting working groups. Mr. Onofri also serves on the Attorney General's Trenton Violence Reduction Strategy Task Force.

In conjunction with the Prevention Coalition of Mercer County, Mercer County Chiefs of Police Association and area hospitals, Mr. Onofri created the START (Steps to Action Recovery Treatment) program in order to provide information about recovery resources to overdose victims and their families.

Mr. Onofri began his career with the law firm of McCarthy and Schatzman, P.A., where he worked as a litigation associate for six years. He also served as the deputy Mercer County counsel and an assistant municipal prosecutor for the city of Trenton before joining the Mercer County Prosecutor's Office in May 1998.

Mr. Onofri graduated with high honors from Rutgers University and the Eagleton Institute of Politics. He earned his law degree from the Villanova University School of Law. He is also a graduate of the FBI's Mid-Atlantic Law Enforcement Executive Development Seminar. He is admitted to the New Jersey Bar and the United States District Court for the District of New Jersey as well as the United States Court of Appeals for the Third Circuit.

Mr. Onofri is a certified instructor with the New Jersey Police Training Commission and teaches numerous courses at the Mercer County Police Academy where he was recently elected as the Chairman of the Board. He is the vice president of the Mercer County Bar Association and a member of the Villanova University School of Law Alumni Association Board of Advisors. Mr. Onofri is also a member of numerous community organizations, including the Hamilton Police Athletic League where he chairs the Scholarship Committee, the Capital City Community Coalition, Trenton Police Explorers, Project READ and he is a founding member and secretary of Crime Stoppers of Greater Trenton. He is the former vice president of the Trenton Police Athletic League, chair of the Trenton Municipal Alliance Committee and secretary of the Trenton Weed and Seed Steering Committee.

Stacy Ann Biancamano, Esq.

Stacy Ann Biancamano opened her practice Biancamano Law, LLC in Chatham, New Jersey on April 15, 2014 with the goal of zealous and effective personal representation of individual clients. Her hands-on approach to legal representation is not only effective in the Court room and in negotiations with federal and state prosecutors but quite simply makes her clients feel at ease.

Ms. Biancamano is an experienced trial lawyer who was formerly a partner at Arleo, Donohue & Biancamano, LLC, from October 2008 until April 2014. She earned her law degree from Seton Hall University School of Law in 1997 and graduated *Summa Cum Laude* in 1992 from St. Peter's College. Quite notably, she has been listed as one of New Jersey's *Super Lawyers* from 2009 thru 2014 for her work as a criminal defense lawyer. She was the 2008 recipient of the Peter W. Rodino Society's Distinguished Public Service Award in recognition of her wisdom, compassion and servant leadership in the public sector.

Stacy has more than 20 years experience representing defendants in the criminal arena. She began her career as an Assistant Federal Public Defender, representing individuals from initial appearance upon arrest through the appellate process. She has successfully handled more than 2,000 federal cases ranging in complexity from white collar fraud offenses including bank fraud, wire fraud and mortgage fraud to federal drug conspiracies. She has argued successfully before the Third Circuit Court of Appeals. It was in the federal court house in the District of New Jersey that she developed the necessary skill set to be an extremely effective advocate for her clients.

As an experienced trial lawyer, Stacy defends all types of criminal cases. She has successfully tried criminal jury trials in federal and state courts. Over the last decade, her cases have involved charges of drug possession and distribution, money laundering, wire and mail fraud, mortgage fraud and other violations of federal and state statutes. She has also successfully handled a wide variety of matters at the grand jury stage, involving charges of healthcare fraud and other business related crimes. Quite notably, Stacy has represented individuals in the District of New Jersey who were the subject of the grand jury and has successfully convinced the U.S. Attorney's Office not to prosecute criminally. As a result of Stacy's trial skills and reputation, she is often able to negotiate and achieve significant pretrial resolutions of matters which is a great benefit to her clients whether they be individuals, business entities or major corporations.

In addition to her extensive criminal trial experience, Stacy's practice also includes representing businesses and corporations involved in complex civil litigation. Specifically, she regularly provides counsel to a business entity regarding practices, procedure and regulatory issues. Additionally, she provided counseling to major healthcare corporations in areas of third-party subpoena compliance and litigation. Stacy is also active with professional associations and serves as an executive board member with the Association of Criminal Defense Lawyers, the

Association of the Federal Bar and the Historical Society for the District of New Jersey. She has also served on the Merit Selection Panel and Reappointment Committee for the United States District Court.

Mrs. Biancamano has frequently lectured regarding issues of criminal law for local, state and federal bar associations. She also served as an expert and frequently lectured on federal sentencing guideline issues at National Federal Defender conferences nationwide.

DANIEL SHAPIRO is an Assistant United States Attorney in the District of New Jersey serving in the Office's Computer Hacking and Intellectual Property Section of the Economic Crimes Unit and also serves as the Office's Criminal Electronic Discovery Coordinator. The Economic Crimes Unit conducts large-scale, complex financial fraud investigations and prosecutions, including bank, mortgage and corporate fraud; securities and commodities fraud; Recovery Act, TARP, and other federal funding fraud; and identity theft. This unit also includes the Computer Hacking and Intellectual Property ("CHIP") Section, which focuses on cyber attacks, such as data breaches, botnets, malicious computer viruses, logic bombs, and computer intrusions, as well as intellectual property-related crimes, such as theft of trade secrets, copyright, and trademark violations. The CHIP Section engages in outreach to build on existing partnerships with private industry to investigate and prosecute cybercrimes.